Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-854

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ALEXANDER L. STEVAS,
CLERK

FRANCOIS SEGUIN, M.D.

and

PATRICIA BLACK,
Petitioners,

v.

AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., et al.,

and

CITY OF AKRON, OHIO, et. al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Attorneys for Petitioners

1981 — Anderson Graphics, Inc., 521 North Eighth Street, Milwaukee, Wisconsin 53233 — 276-4445

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QUESTIONS PRESENTED

1. May a state apply juvenile court rules which apply to all judicial consent proceedings seeking necessary medical treatment for unemancipated minors to the judicial consent alternative to parental consent for abortion in the case of an unemancipated, immature minor?

2. May the state constitutionally seek to include the parents or legal guardian of a pregnant, unemancipated, immature minor by notice and service of summons in a pending juvenile court proceeding which has been filed, without prior notice to them, to obtain judicial consent for an abortion?

3. Are sections 1870.05(B) and 1870.06 of the Codified Ordinances of the City of Akron, Ohio constitutional

on their face and/or as applied to unemancipated, immature minors?

4. What is the appropriate standard of review for regulations which apply to the performance of first trimester abortions, but which do not interfere with the patient's right to decide to terminate her pregnancy?

PARTIES

The petitioners in this action are Francois Seguin, M.D. and Patricia Black. The respondents are the City of Akron, Ohio; John S. Ballard, Mayor; Dr. C. William Keck, Director of Public Health; Peter Oldham, Public Prosecutor; Akron Center for Reproductive Health, Inc.; WomenCare, Inc.; Akron Women's Clinic, Inc.; and Dr. Robert Bliss of Cincinnati.

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The following materials required by Rule 21(k) may be found as follows in the separately-bound Appendix filed on behalf of the City of Akron in City of Akron v. Akron Center for Reproductive Health, et al.:

Judgment of the United States Court of Appeals for the Sixth Circuit dated June 12, 1981............37A

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District Court Memorandum Opinion dated August 22, 1979.........43A

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OPINIONS BELOW

The opinions of the District Court and the Court of Appeals for the Sixth Circuit have been reported at 479 F.Supp. 1172 (N.D. Ohio 1979) and 651 F.2d 1198 (6th Cir. 1981) respectively.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals was entered on June 12, 1981 and rehearing was denied as to respondents, Akron Center for Reproductive Health, et al., and as to petitioners on July 22, 1981. This petition was filed within the applicable 90-day period following entry of the order denying a rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Amendment I
Amendment XIV

42 U.S.C. § 1983.

Constitution of Ohio - Article XVIII, § 3

Ohio Revised Code - § 2151.03

Ohio Revised Code - § 2151.03.1

Ohio Revised Code - § 2151.23(A)(1), (E)

Ohio Revised Code - § 2151.27

Ohio Revised Code - § 2151.28

Ohio Revised Code - § 2151.281

Ohio Revised Code - § 2151.33

Codified Ordinances of the City of Akron, Ohio

Section 1870.05

Section 1870.06

*All Relevant Constitutional and Statutory Provisions are quoted in full in the Supplemental Appendix which follows this petition. Additional Statutory Provisions, including the entire Akron Ordinance, will be found at pages 115A, _et. seq._ of the separately-bound Appendix of the City of Akron.

STATEMENT OF THE CASE *

1. Proceedings Below

This litigation began as a challenge to the facial validity of Chapter 1870 of the Codified Ordinances of the City of Akron, Ohio (here-after "the City") pursuant to 42 U.S.C. §§1983 and 28 U.S.C. §1331. The ordinance was passed by the Akron City Council and was to have become effective on May 1, 1978, but a preliminary injunction restraining its enforcement was entered on April 27, 1978 by the United States District Court for the Northern District of Ohio, the Honorable Leroy J. Contie, Jr. presiding. A trial on the merits was held September 5-21, 1978. Final decision on the merits was rendered on August 22, 1979 (43A) and, upon the filing of a motion to alter or amend the judgment pursuant

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*All references are to the separately-bound Appendix filed by the City of Akron and are designated (____-A).

to F.R.Civ.P. 59, the original Memorandum Opinion and Order were modified by the order of the District Court filed on October 4, 1979.(107A) Timely appeals were filed by all parties in the trial court and, by opinion and order dated June 12, 1981, the United States Court of Appeals for the Sixth Circuit entered a split (2-1) decision affirming in part and reversing in part the opinion of the District Court. (1A) Judge Cornelia Kennedy filed a concurring and dissenting opinion on the merits. (25A) Motions filed by the parties for reconsideration were denied on July 10 and 22, 1981. (39A, 41A)

The interests represented in the litigation are those of the plaintiff abortion clinics (hereafter "clinics"), a physician who purports to represent the rights of clinic patients, including "immature" minors, who desire abortions ("Dr. Bliss"), the City of Akron (hereafter "City") in its capacity as the governmental entity which passed the law, and intervening parents (hereafter "parents" or "Mrs. Black" or "Dr. Seguin") who were permitted by the District Court to proceed "in their individual capacity as parents of unmarried daughters of childbearing age."

This petition raises several of the issues which have not been resolved by this Court since *Roe* v. *Wade, 410 U.S. 113 (1973)* and *Doe* v. *Bolton, 410 U.S. 179 (1973)* and their progeny. Among these are:

1) The appropriate standard of review in an abortion-related case;

2) The nature of the judicial proceeding held to be permissible in *Bellotti* v. *Baird, 428 U.S. 132(1976) (I) and Bellotti* v. *Baird, 443 U.S. 622 (1979) (II).*

3) The permissible extent of regulations which seek to further a truly "informed" consent to abortion.

2. Statement of Facts

Petitioners, Dr. Francois Seguin and Patricia Black, are parents of unemancipated, immature, minor daughters of childbearing age. At trial they were most directly concerned with the provisions of Sections 1870.05 and 1870.06(B) of the Akron ordinance at issue in this case. Section 1870.06(B) provides a set of guidelines for informed consent and, in so doing, seeks to ensure that women, minors, and their parents will have all facts necessary to make a truly informed decision regarding abortion. (120A & Supp. App. at 9)

Section 1870.05 establishes two rules to govern the conduct of abortion clinics when dealing with unemancipated minors. (119A-120A) In the case of unemancipated minors, ages 15-17, Section

1870.05(A) provides that a physician may not perform an abortion on such a minor without utilizing one of two options: if the minor is not accompanied by her parent or legal guardian, (1) the clinic must either notify the parents of the proposed abortion, or (2) possess a valid judicial consent to the abortion procedure. The Court of Appeals reversed the District Court's holding and upheld the facial validity of the rule because the plaintiffs were clinics and a physician. "Until the requirements of Section 1870.05(A) are questioned by a minor who claims to be mature or emancipated or claims that notice would not be in her best interest," the majority held, we cannot hold the section facially invalid." (13A)

In the case of minors under the age of 15, Section 1870.05(B) provides that at least one parent must be notified and consent to the abortion, or that judicial approval of the abortion be obtained before it is performed. Although the record supports the general contention that almost all minors approach the abortion decision seeking guidance, approval and moral support (Tr. II, 77, 80)[1], that contention applies almost universally to minors under the age of fifteen. Each of the experts who testified conceded that it was most unlikely that a minor of these tender years could make an adequate decision on her own regarding pregnancy. (See e.g., Tr. X, 14) On the record below, therefore, Section 1870.05(B) applies only to what have been called "immature" or unemancipated minors. Nevertheless, both the District Court and the Court of Appeals held the requirement of either parental notice and consent or judicial consent invalid. The Court of Appeals reasoned that *Bellotti* v. *Baird (II), 443 U.S. 622 (1979)*, required invalidation of any statute which "provide[s] a possible third party veto." (12A) It did not discuss whether the provision for judicial override of the parental decision was significant or whether it considered a juvenile judge to have an impermissible "third party veto." The District Court, on the other hand, held Section 1870.05 to be invalid in toto because Chapter 2151 of the Ohio Revised Code (which was not challenged in this case) applies to all juvenile proceedings which seek judicial consent for necessary medical treatment and requires that the parents or legal guardians be served with summons and a copy of the complaint after a petition has been filed invoking the jurisdiction of the Juvenile Court. *See Ohio Rev. Code §§ 2151.27, 2151.28.*

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[1] All references to the record are to transcript volume and page number.

It is clear from the trial record that most of the "informed consent" information required to be given by Section 1870.06(B) to a minor and/or her parents is not given unless specifically requested by the patient because the clinics consider the information to be either harassing, disturbing or irrelevant. The Court of Appeals held that all subsections were unconstitutional, regardless of their content, on the grounds that they impose "'restrictions or regulations governing the pregnant woman's attending physician with respect to the termination of her pregnancy, '[Planned Parenthood of Central Missouri v. Danforth], 428 U.S. at 80," notwithstanding any showing whatsoever that a true doctor-patient relationship of the sort contemplated in *Roe v. Wade, 410 U.S. 113 (1973)* even exists between the clinics and their patients.

a. Counselling and Physician Contact

The record amply demonstrates that physicians have very little contact with pregnant minors who seek abortions at the respondent clinics. Respondent, Dr. Bliss, the physician purportedly representing the rights of minors in Akron, lives and practices in Cincinnati, nearly 300 miles to the southwest. He only occasionally performs abortions at one of the clinics, and when he does, he spends only five to ten minutes with each patient immediately prior to performing her abortion. (Tr. I, 179) In some cases, the patient has received a tranquilizer before she is examined by a doctor whose heavy foreign accent makes his speech difficult to understand.

(Tr. III, 36, 39, 76). Dr. Bowen, who testified to the position of the Summit County Medical Society, admitted on cross-examination that the practices just described were not in accord with his own standards (Tr. V, 61-63), and that he had never looked into the counselling and procedures at the clinics before rendering an opinion on the need for this ordinance (Tr. V, 43-57). All the expert witnesses, even those called by the clinics, made it clear that adequate counselling (i.e., more than simply information giving) has a positive effect which will minimize most abortion problems. (Tr. IV, 89-93; VIII, 20-45; X, 184-198).

For the petitioner-parents the primary issues in this case are the well-being of their children and their own due process rights when the state takes action which will affect the future health and welfare of their unemancipated, immature minor children. Because of this concern, it is particularly relevant to note at the outset that the type of treatment afforded minors who seek abortions at the respondent clinics does not meet the standards of any of the expert witnesses called at trial. A concerned parents' only input into the decision of an immature minor who is fearful of her parents' reaction to the knowledge of her condition (whether well-founded or not) would be provided by the concurrent operation of Section 1870.05(B) and the Ohio Revised Code §§ 2151.27, 2151.28.

Ms. Francene Lucas (whose testimony begins at Tr. VII, 146), a counsellor at the Womencare Clinic, was typical of the counsellors who appeared before the District Court. She does not have a bachelor's degree, although she did "attend college for approximately two years." She took two biology courses, one psychology course, and one sociology course, but had no other formal education. (Tr. VII, 159-160). She received approximately eight hours of training for what she would be doing in a counselling capacity at the clinic. On various occasions during this eight-hour period, she spent about an hour in consultation with a doctor. (Tr. VII, 159-161). She was not required to do any reading of the literature other than that provided in the clinics and was not tested on material she did read. (Tr. VII, 165).

The record discloses that Ms. Lucas' only previous experience in counselling was "as a respiratory therapist." (Tr. VII, 147). She spends approximately 15-25 hours per week, both in person and via "telephone counselling," advising women contemplating abortion. (Tr. VII, 148-149). In the course of a normal business day, she would spend one to two hours answering the telephone or receiving people as they walk in the door. (Tr. VII, 149). She would conduct two, possibly three, counselling sessions, and 85% of the persons would participate in group counselling. (Tr. VII, 150). Ms. Lucas' general procedure is to speak with each patient individually "for a few moments," and then "take her into the group counselling room" where she would "(give) information about the abortion procedure itself, (and) what (the patient could) expect to experience during and after the procedure." The patient is also told "how much time she will be spending in each area of the clinic, the laboratory, the procedure room, the recovery room, (and) which personnel members she will have contact with." (Tr. VII, 152-153).

After this, the patient is given information as to what she may expect for two weeks following the abortion procedure. She also receives follow-up examination information, birth control information, and information about possible complications and hazards that may occur during and after the procedure. She is asked to read the consent form -- a package that lists the risks and complications that may be involved -- and asked to sign her name. (Tr. VII, 153). Then the patient is put through the group sessions, and only thereafter introduced to the nurse and doctor. (Tr. VII, 153). Some patients, including minors, may also receive preoperative medication on standing physician orders (librium or valium) before they see the doctor. (Tr. VII, 157), 181.

Although Dr. Healed, an expert called by Plaintiffs, testified that ability to consent and "the whole issue of teenage pregnancy is related to age" (Tr. II, 77, 83). Ms. Lucas stated that in her understanding, "(i)t is not anybody's responsibility there at the clinic to judge the maturity of an under-fifteen-year-old" (Tr. VII, 166), even though the vast majority of the patients visiting the clinic have visited it only on the day of the abortion (Tr. VII, 168) and maturity is conceded to be necessary for a truly informed consent.

During cross-examination, Ms. Lucas admitted that the fact of pregnancy is relevant to counselling, as is gestational age and birth control information, but that she did not routinely mention to a patient that there are numerous public and private agencies to assist her during her pregnancy. Information on fetal development was not considered by the witness to be relevant to the decision to have an abortion. (Tr. VII, 169-171). Ms. Lucas felt that it was a "fair statement" to say that her role in counselling a minor was that of "information giving only" (Tr. VII, 174), even though Dr. Shelley, a psychiatrist with extensive experience, described the need for a much more detailed and personalized approach to counselling. (Tr. X, 186, et seq.).

Minors are subjected to group counselling with adults in which they receive little personal attention. (Tr. VII, 174-175). One of Respondents' experts, Dr. Healed, testified that teenagers tend to be intimidated easily if they are treated as adults. He explained that they are unsure of themselves and do not respond in the same manner as adults because they lack adult coping skills, (Tr. II, 86), and yet, the very clinics which produced the expert concede that the treatment of minors, who are frightened and easily intimidated, is no different from the treatment of adults. (Tr. VII, 175; III, 88; II, 86, 93 and 209). In fact, one clinic even separates a minor *from the parent who accompanies her to the clinic* if other group members object. (Tr. III, 92).

b. Judicial Alternative

The District Court did not hear evidence respecting the nature of the judicial proceeding contemplated by Section 1870.05. For example, it did not consider that the contours of the hearing are governed by federal and state constitutional due process requirements. Such requirements specify that, except in emergencies, notice must be given to parents of any hearing which can affect their rights, and that expedited hearings are available. Since Ohio Juvenile Procedure was not challenged either on its face or "as applied" to abortions for immature minors, the court did not discuss why the hearing provided by Ohio for all medical cases where parental consent is unavailable would be inadequate "as applied" to abortion for an immature minor.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE COMPLEX ISSUES REGARDING PARENTAL NOTICE AND JUDICIAL CONSENT FOR IMMATURE MINORS LEFT OPEN BY *H.L.* v. *MATHESON* AND *BELLOTTI* v. *BAIRD(II)*.

A. The Record Below Demonstrates That Only Immature Minors Are Affected By The Parental-Judicial Consent Provisions Invalidated By The Court of Appeals and the District Court.

Section 1870.05(B) of the Akron Ordinance applies, by its terms only to minors under the age of fifteen. Although the record amply supports the contention that all minors approach the abortion decision seeking guidance, approval and moral support from others (Tr. II, 77 and 80), the assertion applies almost universally to minors under fifteen. All experts who testified at trial regarding minors conceded that it was most unlikely that a child of fourteen or under could make an adequate decision on her own regarding pregnancy. (E.g., Tr. X, 14). Nevertheless, both the District Court and Court of Appeals removed parental and judicial safeguards designed to assure that an informed adult having the child's best interest in mind will help her decide. Instead, financially-interested abortion clinic staff having no experience or special training regarding the counselling of immature minors, and who admit to making absolutely no attempt to measure the emotional, moral, physical or psychological maturity of the minors to consult them are left to decide for them.

By contrast, the petitioners, Dr. Seguin and Patricia Black, made it clear that their daughters could be harmed by leaving them at the mercy of a clinic that will profit only if the choice is to abort. Petitioner, Patricia Black, for example, stated that her desire to be notified prior to an abortion on her daughter was based on her knowledge that she "would lack maturity to make a decision on her own [,]" and that "[s]he couldn't possibly . . . be capable of considering all of the side effects of the situation." Mrs. Black also testified that an abortion "would probably hinder her [daughter] physically, mentally, and spiritually, and that she couldn't possibly consider all the sides on her own." (Tr. VI, 53-54). Petitioner Dr. Francois Seguin, a board-certified pediatrician who testified both as an expert in the care and treatment of minors and as the father of immature, unemancipated, minor daughters of child-bearing age, "felt it was of utmost importance that [h]e as a parent would be knowledgeable of it if one [of his daughters] were to become pregnant, so [that he could] properly [counsel her]." (Tr. VII, 50). He felt that his guidance and support as a parent was needed because he did "not think that at 14, 15 or 16 [his child could] make a mature judgment as to what ought to be done in such a situation." (Tr. VII, 50). The testimony of the other experts supports him. *(E.g., Tr. I, 115) (Clinics' expert).*

The record also demonstrates that moral views differ over the acceptability of abortion as a "solution" to a problem pregnancy, and that some parents consider this a major factor in determining whether an abortion is in their daughter's overall "best interest." Both Dr. Seguin and Mrs. Black oppose that solution and would seek to relate those views to their daughter as a part of their responsibility to instruct her in matters of morals should they find that she has become pregnant. By contrast, the clinics feel abortion is generally the answer for a pregnant minor and appear to consider any discussion of the moral perspective either irrelevant or "disturbing". (See e.g. Tr. I, 108). They simply assume that a child is able to make a major life decision such as abortion if she is able "to state the benefits of not being pregnant in [her] life, and the disadvantages of continuing the pregnancy in [her] life, in [her] circumstances." (Tr. II, 189-190). Assuming for the sake of argument that all parties can agree with the abstract proposition that any troubled, pregnant twelve-year-old with normal intelligence can recite some "benefits" of not being pregnant, it should be obvious that such an approach begs both the maturity and "best interests" questions. This was not the test of maturity this Court had in mind when it decided *H. L.* v. *Matheson*, *-U.S.-, 101 S. Ct. 1164 (1981)*, but it is the test which the respondent clinics apply. Ironically, the decisions below make it impossible for either a concerned parent or a juvenile court judge to protect the pregnant child from such a self-serving "test" for maturity. *Roe v. Wade, 410 U.S. 113 (1973),* was never intended to subvert the standards of pediatric care in the community. (See Tr. VII, 54-69, 71-72) (standard of care in Akron).

B. *The Record Below Indicates That the Counselling Provided Immature Minors Is Inconsistent With Community Medical Standards for the Treatment of Immature Minors.*

1. *The Respondent Clinics Make No Attempt to Distinguish Between a "Mature" and an "Immature" Minor.*

The record demonstrates, and all parties agree, that the abortion decision is a difficult one. It requires a good deal of thought, time and understanding, and can have a profound impact on a woman's psychological health in her later life. (Tr. X, testimony of Drs. Sim and Shelley). A truly professional counsellor would assist a minor of any age by exploring her feelings, moral views (Tr. V, 145), knowledge of complications, alternatives, biological facts and possible outcomes, in the hope of assuring that the decision is both firm and informed. When there are gaps in knowledge or resolve, the counsellor acts as a facilitator and attempts to help the patient work through a difficult life situation in the hope of developing a consistent and rational approach to the problems at hand. At the clinics in this case, however, the "counsellors" are unqualified to counsel immature minors and ignore the patently coercive effects of "counselling" children in group sessions with adults [Tr. VI, 133) II, 79 (noting minors' susceptibility to pressure)]. They have no special training which would assist them in determining the maturity level of a given minor (Tr. I, 226; II, 27-29) and make no real effort to do so in any event.[2]

Ms. Goldberger, director of one of the respondent clinics, testified that her clinic wishes to maintain a pregnant woman's "feeling of well-being at the clinic and her feeling of well-being with the decision" (Tr. II, 184-185) by not bringing up topics she feels irrelevant, harassing and/or stressful. (Tr. VI, 121-122). For an immature minor incapable of making the decision on her own and, most likely, unaware of the many considerations which go into such a decision, it would seem that, at a minimum, the factors identified by this Court in *H. L. v. Matheson, - U.S. -, 101 S.Ct. 1164, 1167n.1 (identifying available adoption services, fetal development and forseeable complications and risks of abortion)* and emphasized in Judge Kennedy's dissent below as essential for "informed" consent should be explained to the minor by an adult whom she knows and can trust. The clinics in the instant case consider these matters either burdensome or irrelevant to the decision-making process and admit that they lose their fee if the decision is not to abort at their clinic. In the case of an immature minor, such an attitude translates into a complete lack of concern for the well-being of the child.

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[2] Doctor B, the only physician employed by one of the clinics, testified as follows:

> Q: Do you make any attempt to judge the maturity of the patient?
>
> A: What do you mean "maturity"? Can you explain it to me? I don't understand what do you mean by "maturity". Do you mean, the patient or the --
>
> Q: I am speaking of the maturity of the patient, yes.
>
> A: No. (Tr. VII, 110)

The clinics made it clear below that they use counselling as a means to support the assumed decision of the prospective patient to abort. In the case of an immature minor, all the witnesses agreed that no knowledgeable decision can be made by the child alone. Nevertheless, these clinics object to parental or judicial oversight of the decision-making process, because they feel that abortion is a perfectly "acceptable" moral alternative which is always in the "best interests" of an immature minor. (Tr. VI, 139 "Typically, we enter into a discussion . . . and this certainly includes what she feels is best in her conscience and her life"; Tr. I, 213, Parents included only when they agree that abortion is best alternative; Tr. III, 121, Witness felt "fairly pro-abortion for very young teenager"). By contrast, petitioner

Seguin, a board-certified pediatrician and Professor of Clinical Pediatrics at the Northern Ohio College of Medicine (Tr. III, 54), testified that it is wholly inappropriate to make any assumptions about either what is "best" for an individual minor patient or what they are capable of understanding without assistance from a parent or other adult. (Tr. VII, 51-54). Dr. C., a physician employed by one of the clinics, however, has a different view:

> A. Again, if she was already at the clinic, she's there for one purpose. She's already gone through all the steps to get to the clinic. She's already made her own decisions as to what to do with that pregnancy.
>
> Q. Are you saying, Doctor, then when an individual comes to the clinic she has made up her mind to have the abortion?
>
> A. Sure; when you go to a bar, you go there to drink. (Tr. VII, 33-34).

The absurdity of this situation is convincingly demonstrated by the clinics' attitude toward their minor patients who are alleged to be victims of child abuse (including incest). Perhaps the most common justification for parental "bypass," *see e.g.*, *Bellotti* v. *Baird (II)*, *supra*, *443 U.S. at 642-648 (per Powell, J.)*, is the notion that, if notified, a parent may impose his or her will on the child regarding the decision to abort or otherwise abuse her. Ohio law provides for such fears by mandating that any health care personnel (including respondents) who suspect child abuse must report it to juvenile authorities, (Tr. III, 84) and that any person may seek the permission of a juvenile court to render necessary medical care to a child where the parents are either unavailable or will not consent. *Ohio Revised Code § 2151.27*.

Dr. Seguin testified that standard medical practice in the community is for the physician to seek protection for the child from the juvenile court and _then_ notify the parents that treatment is being considered. (Tr. VII, 88-89) Under Ohio law, potential danger to the child or the immediate need of treatment are recognized, and notice to parents and/or guardians comes only _after_ the child is under protective jurisdiction of the court. *See Ohio Rev. Code §§ 2151.28, 2151.33*. The respondent clinics, however, want no part of such child-centered practices: they neither report actual or suspected abuse cases as required by law (Tr. III, 84), nor do anything to protect the child from future suspected abuse (See Tr. VII, 88-89, setting forth accepted medical practice). Their focus is not to be "supportive of the child, but to be "supportive" of a decision to have an abortion. The collective effect of such practices on immature minors is that unqualified clinic personnel with no experience in child psychology or counselling make the determination that once a pregnant minor comes to the clinic, she has made her choice, and it really is not for the counsellor to discuss it any further unless the child herself asks.

In *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)*, Justice Stewart noted:

> "The counseling . . . occurs entirely on the day the abortion is to be performed . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another. . .. The physician takes no part in this counseling process . . .. Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques. . ..
>
> "The abortion itself takes five to seven minutes . . . The physician has no prior contact with the minor,

> and on the days that abortions are being performed at the [clinic], the physician . . . may be performing abortions on many other adults and minors . . . On busy days, patients are scheduled in separate groups, consisting usually of five patients . . . After abortions, [the physician] spends a brief period with the minor and others in the group in the recovery room. . ." *428 U.S. at 91-92.*

He could have taken the facts directly from the record in this case. The main difference between *Danforth* and the instant matter is the clarity of the record below on each of these points. The clinics made it clear that their principal concern is their own economic interest. If a minor chooses not to undergo an abortion, the clinic loses income, and the physician, paid on a per-patient basis, loses his fee. (Tr. VI, 19-20 and 96-07; V, 108; VII, 5 and 97). It is apparently much faster, simpler, and more efficient for the clinic not to bring up difficult issues.

With fewer questions asked and less information disseminated (Tr. VII, 46-47), the quicker the decision to abort will be made. An immature minor, with her "feelings of well-being" enhanced by a dose of valium or librium (Tr. III, 39; VI, 26-27 and 137; VII, 43) will be docilely led in and out of an operating room by strangers where she is supposed to establish, five minutes or so before her abortion, a "physician-patient" relationship with another stranger -- this time a doctor -- who may not even speak English well enough to make himself understood. (Tr. VII, 98-104). It is this "relationship" on which the Court of Appeals relied to invalidate the alternative parental-judicial consent provisions for immature minors provided by Section 1870.05(B). Because of the court's mechanistic concern for a possible third-party "veto" of a *woman's* "decision," it simply ignored the admissions in the record that it was dealing with *children* who are incapable of deciding on their own. If there can be no "decision" by an immature minor, there can be no decision for a third party to veto.

C. *Respondents Did Not Challenge the Adequacy of the Judicial Alternative to Parental Consent for Immature Minors Provided by Chapter 2151 of the Ohio Revised Code*

The Court of Appeals invalidated Akron's parental/judicial consent option for immature minors because "'the unique nature and consequences of the abortion decision' . . . make it inappropriate, on the basis of deference to parental rights, to provide a possible third-party veto over the decision of the pregnant woman and her doctor to terminate her pregnancy". [citing *Bellotti v. Baird, 443 U.S. at 643*]. The fallacy of this rationale is six-fold:

First, no minor, mature or immature, challenged the statute. As Judge Kennedy pointed out in her dissent

> Section 1870.05(B) is capable of a construction that would render it constitutional. This would be the case if, for example, the order from "a court having jurisdiction" was based, as it constitutionally must be, first on an inquiry into the minor's maturity. Thus, the section is not facially invalid. As the majority notes in reversing the District Court's holding that section 1870.05(A) is unconstitutional, no minor challenges the Akron ordinance. I would not find section 1870.05(B) unconstitutional until a mature minor challenges it and until it has been construed by a lower court (33A).

Second, each of the experts testified that "mature" minors under the age of fifteen are extremely rare. Thus, the Court of Appeals ignored the evidence in the record that Section 1870.05 deals with a *child's* ability to decide -- not a mature woman's.

Third, there is no doctor-patient relationship involved here. Judge Kennedy noted in dissent "that the doctors at Akron Center's Clinic did little, if any, counselling before seeing the patient in the procedure room." (36A) She might also have added that the children whose interests Section 1870.05(B) was intended to protect will, most likely, never see respondent Dr. Bliss again unless they (or their parents) care to drive to Cincinnati.

Fourth no "third-party" veto of the "decision" is involved when, as here, the minor is inherently incapable of making the decision on her own. If she lacks the ability to make a meaningful informed consent, the question for the court is: "who shall decide, if not the child herself?"

Fifth, the Court does not identify the "third party" who can veto. Under Section 1870.05(B) it is certainly not the parents, for a judicial override is available under the Ohio juvenile court law. If judicial override is clearly constitutional under *Bellotti (II)*, *supra*, the alleged defect in the ordinance has not been identified.

Sixth, the "deference to parental rights" Judge Lively found unacceptable (12A) is merely notice and an opportunity to be heard after the jurisdiction of the Juvenile Court is invoked. The Ohio courts have ruled that such "deference" is a requirement of procedural due process when the court is asked to assume custodial rights such as the right to make medical care decisions for an unemancipated, immature minor.

Each of the foregoing factors should alert this Court to the unfortunate reality that the courts below are sacrificing the welfare of children to preserve an abstract and mechanistic formula for deciding abortion cases. A clear, uniform, procedural rule which takes into account the special needs of pregnant children is needed.

In *Bellotti II*, *supra*, this Court, in a divided opinion with no majority, explained that it would be unconstitutional for a state to require parental notice of a proposed abortion prior to a minor's attempt to invoke the power of a juvenile court to consent to an abortion because the parents might prevent the minor from going to court, 443 U.S. at 642-648. Unlike the Massachusetts law at issue in *Bellotti*, the Ohio law which is alleged to be the basis for the unconstitutionality of Section 1870.05(B) has nothing to do with abortion. It was not challenged below, either on its face or "as applied" to abortions. Ohio Rev. Code Chapter 2151 governs the procedure of all juvenile proceedings in the State of Ohio, including cases of alleged medical need, and reflects a procedural due process requirement of notice prior to state action which can have an adverse impact upon important personal rights and interests. *See Goldberg* v. *Kelly, 397 U.S. 254 (1970); In re Gault, 387 U.S. 1 (1967).* The District Court, however, found that the provision of notice under Ohio Rev. Code §2151.28 rendered Section 1870.05(B) unconstitutional. *Akron Center for Reproductive Health, Inc.* v. *City of Akron, 479*

F.Supp. 1172, 1200-1201 (N.D. Ohio 1979). (92A-93A)

In *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)*, this Court found a Missouri statute requiring parental consent prior to abortion unconstitutional because it left the parents with an absolute veto over a minor's decision to have an abortion. Section 1870.05(B) does not provide anyone with an "absolute" (i.e., unreviewable and possibly arbitrary) veto. It applies only to minors whose ability to make the decision is highly questionable and provides for judicial consent where the parents are either unavailable or refuse consent. *Bellotti II, supra,* requires no more.

> We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent it must provide an alternative procedure[23] whereby authori-

> zation for the abortion can be obtained. . . n.23 . . . we discussed the alternative procedure described in the text in terms of judicial proceedings. We do not suggest, however, that a State choosing to require parental consent could not delegate the alternative procedure to a *juvenile court* . . . . *Bellotti II, supra, 443 U.S. at n.23 and text (emphasis added)*

The gravamen of the respondents' problem with Section 1870.05(B), therefore, is not that it provides a "veto", but that it provides for a disinterested forum as contemplated by the express language of *Danforth and Bellotti*. The clinics' position is perfectly consistent with their practice: since they assume that an immature minor's best interests are always served by an abortion, there is no need to raise either of the questions thought to be relevant by this Court. Thus, any questioning of the clinics' motives or their assumptions regarding either maturity or "best interests", by parent, guardian or juvenile judge, is seen as an impermissible "third-party veto" of a "woman's" decision. Petitioners respectfully submit that this is not the sort of veto the Court had in mind.

D. *Chapter 2151 of the Ohio Revised Code Creates the Minimum Constitutionally Adequate Framework For the Resolution Of Disputes Over The Proper Medical Treatment Of Unemancipated Immature Minors.*

1. *Chapter 2151 of the Ohio Revised Code is Constitutional on its Face and "As Applied" to an Immature Minor Seeking Judicial Consent for Abortion.*

The fundamental error of the decisions of the courts below is their complete disregard of well-settled principles of procedural due process. Although Chapter 2151 of the Ohio Revised Code was not challenged "as applied" to judicial proceedings in which an immature minor seeks abortion, it clearly provided the basis for the holding that Section 1870.05(B) was unconstitutional, 470 F. Supp. at 1201. The incongruity of such a holding is immediately apparent upon examination of the procedure required by Ohio law.

Under Chapter 2151 of the Ohio Revised Code, a minor who desires judicial consent for a medical procedure without parental consent, a physician who seeks judicial protection from subsequent civil liability to parents for unauthorized treatment of an unemancipated immature minor, or _any_ other person who deems it appropriate (_e.g._, a teacher, relative, boyfriend, neighbor, abortion clinic, etc.) may file a petition invoking the juvenile court's jurisdiction. Ohio Rev. Code Section 2151.27. There is no requirement in Chapter 2151 or Section 1870.05(B) that any person be notified prior to the filing of the petition. Sections 2151.28 and 2151.33 of the Ohio Revised Code provide for the "hard" cases of emergency and actual or feared child abuse, and petitioner Dr. Seguin testified that invoking the power of the juvenile courts is accepted medical procedure in the community for such cases.

Since this Court's decision in *Bellotti II*, the law has been unclear regarding the exact parameters of the judicial alternative. In both *Bellotti II, and H. L. v. Matheson,* this Court stated that maturity is a key factor, but said nothing regarding the process by which this essentially factual finding is to be made. In keeping with its traditional approach to such matters, the Court left the design of such hearings to the states, *101 S.Ct. at 1172-1173*, with the caveat that due concern must be had for the unique nature of pregnancy and the grave possibility that irate or uncaring parents might prevent the child from seeking judicial consent. *101 S.Ct. 1176-1177 (Powell and Stewart, JJ. concurring).*

In the case at bar, Ohio has a procedure in place which is applied to all claims that a child is in need of medical care. It is flexible enough to accommodate the needs of the pregnant immature minor, the right of her parents to be heard, and the right of the state to assure that the child receives the appropriate medical care. The respondent clinics did not introduce evidence that Ohio juvenile procedure was inappropriate or burdensome "as applied" to the abortion decisions of any minor, mature or immature, and the record contains no evidence that Ohio juvenile judges would disregard the holdings of this Court regarding their duty in this important area of the law.

The "possible third-party veto" rationale of the Court of Appeals fails to recognize that maturity is a question of fact to be determined by the juvenile court on the record before it and that an abortion may not be in the "best interests" of a minor who has been found to be immature by the juvenile court. If a negative "best interest" finding for an immature minor is an unconstitutional "judicial third-party veto", the supposed rule of *Bellotti (II)* which allows alternative parental or judicial consent for immature minors is illusory. The juvenile court would then simply be the rubber stamp for a physician or abortion clinic's determination *for the minor* that an abortion is in her (or its) best interests.

This Court should, therefore, grant certiorari to resolve the continuing controversy over the broad outlines of the judicial consent alternative. The record makes it clear that a maturity determination is a question which turns on the particular facts of each case. (Tr. VII, 54-70). Testimony from a parent or guardian about the characteristics and particular needs of their daughter is essential to such a finding, (Tr. VII, 56-57), and the clinics' own expert, Dr. Adele Hoffman, conceded that she counsels 90% of her own patients to advise their parents first and come in later for treatment or counselling. (Tr. III, 144). Where, as here, the juvenile court is empowered on an emergency basis, to make any order necessary to protect the child from abuse or undue pressure, including a temporary change in custody, *Ohio Rev.*

Code §§ 2151.33, there can be no question that the court's concern will be directed to the best interests of the pregnant child before it. The record below certainly contains no facts which would support a contrary conclusion.

In the instant case, the issue is whether a judge or a parent may give consent for an immature minor incapable of giving a truly informed consent because she lacks the maturity necessary to understand the magnitude of the choice and the maturity to form the physician-patient relationship essential to the holding of *Roe*. *Cf.*, *Collauti v. Franklin, 439 U.S. 379 (1979) (emphasizing central role of physician); Connecticut v. Menillo, 423 U.S. 9 (1975)(same).* The rights of both the child and her parents are involved in a decision which would, of neccesity, terminate the traditional parental right to make reasonable medical care decisions for their immature children. A hearing with adequate safeguards for the rights of all concerned supports and protects the best interests of the child by assuring that all relevant facts are on the record. *Cf., Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10 (S.D. Iowa, 1975) aff'd on other grounds, 534 F.2d 1137 (8th Cir. 1976).* As Justice Frankfurter noted in *May v. Andersen, 345 U.S. 528, 536 (1953):*

> Children have a special place in life. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of the State's duty toward children.

This Court should grant the petition and clarify the law applied by the majority of the court below so that, in the future, the facts--not fallacious reasoning which assumes that children are as mature as adults--will determine the outcome of cases involving the best interests of children in need of medical care.

II. THE STANDARD OF REVIEW IN ABORTION -RELATED CASES SHOULD BE CLARIFIED BY THIS COURT.

A. *The Standard Of Review In Abortion-Related Litigation Is Unclear And Leads To Absurd Results.*

Since this Court's decision in *Roe v. Wade, 410 U.S. 113 (1973)*, there has been considerable confusion among courts and commentators concerning the appropriate standard of review to be applied in abortion-related cases. *Compare, e.g., Abortion Coalition of Michigan, Inc. v. Michigan Dept. of Public Health, 426 F.Supp. 471 (E.D. Mich. 1977) (upholding sanitation regulations as applied to first trimester abortion facilities) with, e.g., Friendship Medical Center v. Chicago*

Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), cert. den. 420 U.S. 997 (1975). (striking down sanitation regulations applied to first trimester abortion facilities). The result has been a plethora of litigation with some of the more complex cases and issues reaching this Court more than once. *E.g.*, *Bellotti* v. *Baird, 443 U.S. 622 (1979); Harris* v. *McRae, -U.S.-, 100 S.Ct. 2671 (1980)*.

The reason for much of the confusion relates to the seemingly absolute nature of the language in *Roe* v. *Wade* that all first trimester regulation, regardless of its asserted justification, is constitutionally suspect. 410 U.S. at 163-164. As a result, maternal health-based regulations which, by their nature, cannot possibly infringe on the woman's right to decide to have an abortion (e.g., the "free-standing surgical out-patient" regulations held valid in *Abortion Coalition of Michigan, supra,* but invalidated in *Friendship Medical Center, supra)* have been invalidated on the basis of this Court's essentially factual conclusion that first trimester abortions are "safer" than childbirth. *Roe v. Wade, 410 U.S. at 164.*

As a justification for a standard of review which focuses on the positive or negative effects on the *decision* to abort (i.e., whether the regulation restricts or broadens safety and/or available choice-influencing factors or information) such a rationale arguably has merit. *Cf., H. L. v. Matheson, -U.S.-, 101 S.Ct. 1164, 1167n1 (1981) (setting out choice-enhancing factors); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1977) ("informed" consent upheld); Bigelow v.*

Virginia, 421 U.S. 809 (1975) (restriction of available information on abortion held invalid). As a justification for an unfocused, across-the-board rationale which would invalidate regulations intended to insure maximum safety and range of choice, the safety-of-first-trimester abortions rationale of *Roe* makes no sense at all. The entire thrust of *Roe v. Wade, supra, and Doe v. Bolton, 410 U.S. 179 (1973)* was to assure that, within limits, abortion was an available choice for women and treated like any other medical procedure. *See Doe v. Bolton, 410 U.S. 179 (1973); Maher v. Roe, 432 U.S. 464 (1977)(recognizing limits to this rationale because abortion is only medical procedure which involves taking of "potential" human life).* It is the confusion over the appropriate standard of review to be applied in abortion cases which has resulted in the invalidation of provisions which do nothing more than treat abortion like any other medical procedure, and the result in this case should convince the Court that its assistance is needed to resolve the matter.

In the case at bar, the majority of the Sixth Circuit panel held that a two-step review process is required to determine 1) whether the challenged regulation is "legally significant" (i.e. not de minimus or "slight") (7A) and if so, 2) whether the regulation is supported by a compelling state interest and does not "unduly burden" the woman's abortion decision. Judge Cornelia Kennedy's well-reasoned dissent from the majority holding below disagreed:

> Because I am less certain than the majority that the Supreme Court's abortion decisions call for such a two-step analysis, I am not able to concur with the panel even though I

do not completely agree with the District Court['s analysis] either. (25A)

* * *

. . . [T]he Supreme Court has never suggested the analysis put forth by the majority. It has sometimes suggested that a compelling state interest is necessary to justify any state regulation of abortion during the first trimester, but the language has always been far broader than required by the facts before it. With the exception of the passage in *Colautti*, *supra*, and a part of *Planned Parenthood*, all of the cases since *Roe* have suggested that the proper standard is simply whether a regulation that does not effectively prohibit abortions is "unduly burdensome" to the decision whether or not to abort. . . .[5](32A)
[5] Charles v. Carey, 627 F.2d 772,

* * *

[5] . . .The Seventh Circuit's concern that plaintiffs who must challenge abortion regulations on other than an across-the-board "compelling state interest" standard will be unable to anticipate the state's possible justifications for the regulations simply does not ring true in the abortion context. Nor do I share the Seventh Circuit's concern that the courts are incapable of determining when a burden on the abortion decision is "undue." (32A)

As Judge Kennedy points out, the majority below "holds that this provision infringes on the medical judgment of the attending physician. [It] does not, however, interfere with the patient's right to decide whether to terminate her pregnancy. *Cf. Colautti v. Franklin, 429 U.S. at 392-394, 396 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 64; Roe v. Wade, supra*. . . . The giving of [s]uch information ehances, rather than restricts, the woman's freedom of choice. 'Informed consent' without this information would be worthless. (citation omitted)."

B. *The Facts Of This Case Compel The Conclusion That The City Has A Compelling Interest In Assuring An Informed Consent For All Women Seeking Abortions, And That This Interest Is Greatly Magnified In Cases Involving Unemancipated, Immature Minors.*

In *Roe v. Wade, supra,* this Court recognized that the right to an abortion is not unqualified and must be considered against important state interests in regulation. *410 U.S. at 154.* The right to abort exists because this Court found no compelling state interest to prohibit a woman and her physician from deciding that abortion is the best course of action for her. The Court emphasized in *Roe* that the abortion decision is to be made *in consultation* with the woman's responsible attending physician. *410 U.S.at 153, 163-165.*

The majority of the Court below, over Judge Kennedy's dissent, has effectively sanctioned the removal of the attending physician from the process while claiming to rely on the privacy of the physician-patient relationship as its rationale. If the physician is only marginally (or not at all) involved in the decision-making process, the entire physician-patient rationale of *Roe* fails, for there is no consultative physician-patient relationship to protect. In *Connecticut v. Menillo, 423 U.S. 9 (1975)*, the Court upheld a requirement that an abortion be performed only by a licensed physician. The Court concluded that the insufficiency of the state's interest in maternal health in the first trimester was predicated upon the fact that the abortion would be performed by a physician under conditions ensuring maximum safety for the woman. 423 U.S. at 11.

> Even during the first trimester of pregnancy, therefore, prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference.

Throughout the course of its decisions since *Roe*, the Court has clearly envisioned a legitimate physician-patient relationship where women troubled by an unwanted pregnancy receives the advice, support and quality medical care they need to assure a reasoned and informed choice, not a production line where medical responsibilities are deferred to unqualified employees. Thus, requiring that the physician personally inform the pregnant woman of the medical facts regarding pregnancy, the risks associated with her pregnancy and the abortion technique to be employed and other information which seeks to assure that the choice is truly informed can hardly be considered "unduly burdensome." Common sense should dictate that such activity should be encouraged and, if necessary, required where it does not exist. "Strict scrutiny" simply serves no purpose unless it can be shown with some clarity that the challenged regulation is intended to restrict a woman's freedom of access to abortion.

The basic consultative function of the physician is providing information as to physical and medical facts regarding pregnancy and abortion, risks, options and aftercare. In conjunction with good medical technique, that consultative function promotes the important interest of the state in protecting the woman's health, regardless of the stage of pregnancy. It is, in fact, the very basis of the asserted "safety" rationale of *Roe*. In the case at bar, Dr. Myre Sim of the Royal Canadian Hospital in Ottawa and an expert in the psychiatric and physiological care of abortion and maternity patients for many years, testified that he did not think that anyone but the doctor himself should give the necessary information, and that such is the general medical practice. (Tr. VIII, 15, 48) By contrast, the testimony of abortion clinic counsellors and physicians demonstrates complete abdication of this responsibility to the women in their care, a point not lost on Judge Kennedy. Her dissent aptly points out that "[t]he evidence presented at trial showed that the decision . . . was made *not* by the woman in conjunction with her physician but by the woman and lay employees of the abortion clinic, the income of which is dependent upon the woman's choosing to have an abortion . . .. Akron's ordinance simply takes into account these realities of the 'physician-patient' relationship at an abortion clinic." (36A) (emphasis added). To apply strict scrutiny to a law supported by facts such as these simply compounds the error and leads to the absurd results urged by the clinics.

CONCLUSION

For all the reasons set forth above, Petitioners urge that their petition for certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

s/ Robert A Destro

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CERTIFICATION OF SERVICE

Two copies of the foregoing petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit were mailed to counsel for respondents this 20th day of October, 1981 addressed as follows:

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s/ Robert A. Destro

Appendix

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(SUPPLEMENTAL APPENDIX)

The following materials required by Rule 21(k) may be found as follows in the separately-bound Appendix filed on behalf of the City of Akron in City of Akron v. Akron Center for Reproductive Health, et al.:

Judgment of the United States Court of Appeals for the Sixth Circuit dated June 12, 1981............37A

Order Denying Plaintiff's Motion for Rehearing...................39A

Order Denying Defendant-Intervenors Motion for Rehearing..........41A

District Court Memorandum Opinion dated August 22, 1979.........43A

Order and Opinion of District Court dated October 4, 1979........107A

Order of District Court dated February 27, 1980.............112A

Chapter 1870 of the Codified Ordinance of the City of Akron..........................115A

Selected Sections of Chapter 2151, Ohio Revised Code.............130A

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The following additional statutes and constitutional provisions are provided for the Court's convenience and are designated as (Supp. App. _____)

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SUPPLEMENTAL APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC §1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation,

> custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Constitution of Ohio - Article XVIII, §3 [Powers]

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Adopted September 3, 1912)

Ohio Revised Code - §2151.03 "Neglected child" defined.

> As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "neglected child" includes any child:
>
> * * *
>
> (C) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals or well being;

Supplemental Appendix 3

* * *

Ohio Revised Code - §2151.03.1 - "Abused child" defined.

* * *

(A) Is the victim of "sexual activity" as defined under Chapter 2907. of the Revised Code, where such activity would constitute an offense under that chapter, except that the court need not find that any person has been convicted of the offense in order to find that the child is an abused child.

* * *

Ohio Revised Code - § 2151.23(A)(1) - Jurisdiction of juvenile court.

(A) The juvenile court has exclusive original jurisdiction under the Revised Code.

(1) Concerning any child who on or about the the date specified in the complaint is alleged to be a juvenile traffic offender, delinquent, unruly, abused, neglected, or dependent.

* * *

(E) The juvenile court has jurisdiction to hear and determine the case of any child certified to the court by any court of competent

> jurisdiction if such child comes within the jurisdiction of the court as defined by this section. (Emphasis added)

Ohio Revised Code - § 2151.27 - Complaint.

> Any person having knowledge of a child who appears to be a juvenile traffic offender or to be delinquent, unruly, abused, neglected, or dependent may, with respect to such child, file a sworn complaint in the juvenile court of the county in which such child has a residence or legal settlement, or in which such traffic offense, delinquency, unruliness, abuse, neglect, or dependency occurred. Such sworn complaint may be upon information and belief, and in addition to the allegation that the child is delinquent, unruly, abused, neglected, dependent, or a juvenile traffic offender, the complaint must allege the particular facts upon the allegation of delinquency, unruliness, abuse, neglect, dependency, or juvenile traffic offender is based.

* * *

Ohio Revised Code - § 2151.28 - Summons.

> (A) After the complaint has been filed, the court shall fix a time for hearing, which, if the child is in detention, shall not be later than ten days after the filing of the complaint. It shall direct the

issuance of a summons directed to the child except as provided by this section, the parents, guardian, custodian, or other person with whom the child may be and such other persons as appear to the court to be proper or necessary parties to the proceedings, requiring them to appear before the court at the time fixed to answer the allegations of the complaint. A child alleged to be abused, neglected, or dependent shall not be summoned unless the court so directs. A summons issued for a child who is under fourteen years of age and who is alleged to be a delinquent or unruly child or a juvenile traffic offender shall be served on his parents, guardian, or custodian in his behalf.

If the person who has physical custody of the child, or with whom the child resides, is other than the parent or guardian, then the parents and guardian shall also be summoned. A copy of the complaint shall accompany the summons.

* * *

(B) The court may endorse upon the summons an order directing the parents, or guardian of the child, or other person with whom the child may be to appear personally at the hearing and directing the person having the physical custody or control of the child to bring the child to the hearing.

(C) The summons shall contain a statement advising that any party is entitled to counsel in the proceedings and that the court will appoint counsel or designate a county public defender or joint county public defender to provide legal representation if the party is indigent.

(D) If it appears from affidavit filed or from sworn testimony before the court that the conduct, condition, or surroundings of the child are endangering his health or welfare or those of others, or that he may abscond or be removed from the jurisdiction of the court or will not be brought to the court, notwithstanding the service of the summons, the court may endorse upon the summons an order that a law enforcement officer shall serve the summons and shall take the child into immediate custody and bring him forthwith to the court.

(E) A party, other than the child, may waive service of summons by written stipulation.

* * *

(G) Any person whose presence is considered necessary and who is not summoned may be subpoenaed to appear and testify at the hearing. Any one summoned or subpoenaed to appear who fails to do so may be punished, as in other cases in the court of common pleas, for contempt of court.

Persons subpoenaed shall be paid the same witness fees as are allowed in the court of common pleas.

Ohio Revised Code - § 2151.281 - Guardian ad litem.

* * *

(B) ... The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged abused or neglected child, and in any proceeding held pursuant to section 2151.414 [2151.41.4] of the Revised Code.

In any proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child where the parent appears to be mentally incompetent or is under eighteen years of age, the court shall appoint a guardian ad litem to protect the interest of such parent.

The court shall require such guardian ad litem to faithfully discharge his duties, and upon his failure to do so shall discharge him and appoint another. The court may fix compensation for the service of the guardian ad litem which shall be paid from the treasury of the county.

A parent who is eighteen years of age or older and not mentally incompetent shall be deemed sui juris for the purpose of any proceeding relative to his child alleged or adjudicated to be an abused, neglected, or dependent child.

In any case wherein a parent of a child alleged or adjudicated to be an abused, neglected, or dependent child is under eighteen years of age, the parents of said parent shall be summoned to appear at any hearing respecting the alleged or adjudicated to be an abused, neglected, or dependent child.

Ohio Revised Code - § 2151.33 - Temporary care; emergency medical treatment; reimbursement.

Pending hearing of a complaint filed under section 2151.27 of the Revised Code and service of citations, the juvenile court may make such temporary disposition of any child as it deems best. Upon the certificate of one or more reputable practicing physicians, the court may summarily provide for emergency medical and surgical treatment which appears to be immediately necessary for any child concerning whom a complaint or an application for care has been filed, pending the service of a citation upon its parents, guardian, or custodian. The court may order the parents, guardian, or custodian, if found able to do so, to reimburse the court for the expense involved in providing such emergency medical and surgical treatment, and any such person who disobeys such order may be adjudged in contempt of court and punished accordingly.

When such emergency medical and surgical treatment is furnished a child who is found at the hearing to be a nonresident of the county, and if the expense of such medical and surgical treatment cannot be recovered from the parents, legal guardian, or custodian of such child, the board of county commissioners of the county of which such child has a legal settlement shall reimburse the court for the reasonable cost of such emergency medical or surgical treatment out of its general fund.

CODIFIED ORDINANCE OF THE CITY OF AKRON, OHIO

SECTION 1870.05 NOTICE AND CONSENT

(A) No physican shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of parents or guardian, computed from the time of mailing, unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman.

(B) No physician shall perform or induce an abortion upon a minor pregnant women under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, or

(1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or

(2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

SECTION 1870.06 INFORMED CONSENT

(A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05 (B) of this Chapter, given freely and without coercion.

(B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05 (B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where appplicable, have been informed as follows:

(1) That according to the best judgment of her attending physician she is pregnant.

(2) The number of weeks elapsed from the probably time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.

(3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characterists of the particular unforn child at the gestational point of development at which time the abortion

is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.

(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

(5) That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

(6) That numerous public and private agencies and services are available to provide her with birth control infor-

mation, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services availble if she so requests.

(C) At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05 (B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

Appendix

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81-854

Law Reprints Editor's Note: The following Appendix from Docket No. 81-746 (certiorari granted on May 24, 1982) is referred to in Petitioner's Supplemental Appendix page i and is reproduced here for convenience.

81-746

Office - Supreme Court, U
FILED
OCT 30 1981
ALEXANDER L. STEVA
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CITY OF AKRON,
Petitioner,

v.

AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., *ET AL.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 79-3700
No. 79-3701
No. 79-3757

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.,
Plaintiffs-Appellants, Cross-Appellees,

v.

CITY OF AKRON, ET AL.,
Defendants-Appellees, Cross-Appellants,

FRANCOIS SEGUIN, ET AL.,
Intervenors Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed June 12, 1981.

Before: LIVELY and KENNEDY, Circuit Judges; and GIBSON,* District Judge.

LIVELY, Circuit Judge, delivered the opinion of the Court, in which GIBSON, District Judge, joined. KENNEDY, Circuit Judge (pp. 25-36) filed a separate opinion concurring in part and dissenting in part.

---

* The Honorable Benjamin F. Gibson, Judge, United States District Court for the Western District of Michigan, sitting by designation.

LIVELY, Circuit Judge. These consolidated appeals seek review of various holdings of the district court in an action challenging the constitutionality of an ordinance of the City of Akron, Ohio which regulates abortions. By its terms the ordinance was to become effective May 1, 1978, and the present suit was filed in the district court on April 19, 1978. The plaintiffs are three Ohio corporations that operate outpatient abortion clinics in Akron and a physician who has performed abortions at one of the clinics. The defendants are the City of Akron, its mayor and director of public health and the police prosecutor of Akron. The district court permitted participation as defendants by a group of intervenors "solely in their independent capacity as parents of unmarried minor daughters of child-bearing age."

I. The District Court Opinion

The opinion of the district court is reported at 479 F. Supp. 1172 (1979), and the ordinance is reprinted as an appendix to the opinion. The district court concluded that the ordinance is severable and examined it on a section-by-section basis. We agree that the ordinance is severable and will follow a similar procedure in our analysis.

A.

The three clinics provide abortions only during the first trimester of pregnancy but are willing to perform early second trimester abortions if permitted to do so. The plaintiff physician has performed first trimester abortions at one of the clinics. The district court described the operation of the clinics as follows:

> The patients for whom the clinics provide their services range in age from about twelve years to approximately forty-five years. Two of the clinics provide abortions on three days a week (Wednesday, Friday, and

Saturday) and the third provides abortions two days a week (Wednesday and Saturday).

Patients usually make their first contact with one of the clinics over the telephone. If a woman telephones and indicates that she desires an abortion and that her pregnancy has not progressed beyond the end of the first trimester, she will be given an appointment for one of the "procedure days." When the patient arrives at the clinic on the day of her appointment she is asked certain questions about her medical history and her pregnancy. She also participates in a group counseling session with counselors employed by the respective clinics. These counselors have varying degrees of qualifications, none, however, is a physician. During the group counseling session, the patients are given information concerning the procedure to be performed upon them, information on birth control techniques, and after-care instructions. At some time near the close of her group counseling session, each patient is asked to sign a document acknowledging her informed consent to the performance of an abortion.

A patient's first contact with the physician who is to perform the abortion procedure usually occurs when she is taken into the operating room. At that time, the physician reviews the patient's medical chart and asks the patient if she has any questions. The doctor then performs a pelvic examination. If the pelvic examination does not reveal any medical problems and, further, indicates that the pregnancy has not progressed beyond the first trimester, the abortion usually will then be performed. There was some evidence that if the physician sensed that the patient was ambivalent concerning her decision, he would suggest that she return at another time after she had had some additional time to consider alternatives to abortion.

The abortion method used at the clinics is dilation and

> suction curettage (D&C). The procedure itself takes approximately five minutes.

479 F. Supp. at 1181/82.

B.

We will limit our consideration of the constitutionality of the Akron ordinance to due process issues. The district court gave full and thoughtful consideration to claims of the plaintiffs that the ordinance violates the First Amendment requirement of separation of church and state and the Equal Protection Clause of the Fourteenth Amendment and rejected these claims. We agree with the treatment of these contentions by the district court and with its conclusion, and will not repeat them here.[1]

The district court held that no plaintiff had standing to contest the validity of several provisions of the ordinance. Except where the parties have specifically appealed these rulings, standing will not be discussed in this opinion. The appealed holdings of the district court, described in general terms, were as follows:

(1) Section 1870.03, requiring all abortions after the first trimester to be performed in hospitals, was held valid.

(2) Section 1870.04, dealing with abortions after viability, was not considered by the court because no plaintiff was found to have standing.

(3) Section 1870.05, requiring notice to one of the parents or the legal guardian of a minor seeking an abortion and consent to such an abortion, was held invalid.

(4) Section 1870.06(A), requiring informed written consent of the woman seeking an abortion, was held valid.[2]

---

[1] The district court's First Amendment holding is strongly reinforced by the recent opinion of the Supreme Court in *Harris* v. *McRae*, —— U.S. ——, 100 S.Ct. 2671 (1980).

[2] Though the holding with respect to section 1870.06(A) was not appealed, it is listed for clarity, since the holdings as to the related sections 1870.06(B) and 1870.06(C) were appealed and are discussed in this opinion.

(5) Section 1870.06(B), detailing the information required to be given by the attending physician in obtaining consent of the woman seeking an abortion, was held invalid.

(6) Section 1870.06(C), requiring the attending physician to detail the particular risks associated with the patient's pregnancy and the abortion technique to be employed, was held valid.

(7) Section 1870.07, requiring a 24-hour waiting period between the time the consent is signed and the abortion is performed, was held valid.

(8) Section 1870.16, requiring that the remains of an aborted fetus be disposed of in "a humane and sanitary manner," was held invalid for vagueness.

II. The Standard for Testing the Validity of the Ordinance

The plaintiffs contend on appeal that the district court applied an erroneous standard in testing the constitutionality of the various provisions of the ordinance. Rather than requiring the City to demonstrate the necessity of the various provisions to further a compelling interest of the City, the district court tested the ordinance by less stringent standards. In short, it is the position of the plaintiffs that the district court failed to subject the ordinance to the strict scrutiny required by controlling decisions of the Supreme Court.

A.

The district court acknowledged that the pioneering opinion in the field of abortion law, *Roe* v. *Wade*, 410 U.S. 113 (1973), speaks in terms of the fundamental right of a pregnant woman to make an abortion decision in consultation with her physician and holds that regulations limiting fundamental rights may be justified only by some compelling state interest. Further, any legislative enactment which affects such rights must be narrowly drawn to express only the legitimate state interest at stake. The first point at which the Supreme Court identified a compelling state interest — an interest in the health of the pregnant woman — was "at approximately the end of the first trimester." *Id.* at 163. However, after reviewing Supreme Court decisions subsequent to *Roe* v. *Wade,* the district court concluded that a state may impose certain limitations on the right to an abortion, even in the first trimester, so long as these regulations do not "unduly burden" the decision-making process and are rationally related to a legitimate purpose of the state. This conclusion was summarized in the following language of the district court:

> It becomes clear, therefore, from an examination of the cases decided since *Roe,* that not all regulation of first trimester abortion providers is impermissible. An absolute prohibition of first trimester abortions could only be justified by a compelling state interest. Likewise, regulations that afford the power to veto a woman's decision to terminate her pregnancy must be supported by a compelling state interest. *See Danforth,* 428 U.S. at 67-72, 96 S.Ct. 2831. Regulations that interfere with a woman's privacy to a lesser degree, however, require a lesser showing by the state to withstand constitutional attack: "As *Whalen* [v. *Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977)] makes clear, the right in *Roe* v. *Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it." *Maher, supra* 432 U.S. at 473, 97 S.Ct. at 2382.
>
> Accordingly, the Court must determine the degree that each section of Ordinance Number 160-1978 interferes with a woman's constitutional right, in consultation with her physician, to choose to terminate her pregnancy. That interference must then be weighed against any valid state interest furthered by such section. Finally, it will be necessary to consider the combined effect of all the various sections not independently unconstitutional to determine whether their combined impact results in such

> a degree of interference with the constitutional right at issue to result in a finding of invalidity.[22]
>
> ---
>
> [22] Every regulation imposed upon first trimester abortions is going to have some impact upon a woman's right to decide to terminate her pregnancy. That is, any regulation that makes "the physician's work more laborious or less independent," *Whalen* v. *Roe*, 429 U.S. 589, 605 n.33, 97 S.Ct. 869, 879 fn.33, 51 L.Ed.2d 64 (1977), is, at least, going to make it more expensive for a woman to effectuate her abortion decision. If the combined weight of a number of regulations, not independently unconstitutional, were to serve to make it unduly burdensome for a woman to carry out her decision, those sections would be invalid.

479 F.Supp. at 1200.

B.

We believe the district court read too much into the post-*Wade* decisions of the Supreme Court. In *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976), the Court found, at least implicitly, that a regulation requiring a pregnant woman to sign a written consent to an abortion did not "restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy." 428 U.S. at 66. The Court also found, explicitly, that a recordkeeping requirement of the Missouri statute imposed "no legally significant impact or consequence on the abortion decision or on the physician-patient relationship." *Id.* at 81. The validation of these provisions of the Missouri statute was based upon a finding that neither provision involved an intrusion into the decision-making process sufficient to require constitutional analysis. The decision was not based on a holding that the constitutionality of the statute could rest on something less than a compelling state interest. There is no indication in *Danforth* that if the intrusions had been found significant, any state interest less than a compelling one would have served to validate them. The most that may be inferred from *Danforth* is that there are some *slight* intrusions which the state may make into the decision-making process, even during the first trimester of pregnancy.[3] These intrusions are not "legally significant," and do not trigger a further constitutional analysis.

Maher v. *Roe*, 432 U.S. 464 (1977), offers even less support than *Danforth* for the proposition that the constitutionality of the Akron ordinance may be tested by some standard less demanding than a compelling state interest. The statute under attack in *Maher* forbade the expenditure of state funds for nontherapeutic abortions while permitting such expenditures for childbirth. The plaintiffs in *Maher* argued that the statute offended the Equal Protection Clause by creating an impermissible classification. In upholding the statute the Supreme Court emphasized the differences between the funding statute before it in *Maher* and the "drastic" restrictions imposed on the abortion decision by the statute at issue in *Wade* v. *Roe*, 432 U.S. at 472. Treating childbirth and abortion as two alternative medical methods of dealing with pregnancy, the state was required to demonstrate only that there was a rational relationship between the decision not to fund nontherapeutic abortions and its decision to favor childbirth over abortions. The Court repeatedly emphasized in *Maher* that the Connecticut statute dealt only with funding and did not place any limitations on the right to have an abortion. *See also*, *Beal* v. *Doe*, 432 U.S. 438 (1977), and *Harris* v. *McRae*, *supra.*

As the Court pointed out in *Maher*, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 432 U.S. at 475 (footnote omitter). In *Roe* v. *Wade*, as in the present case, the state attempted "to impose its will by force of law" by making it a crime to provide services which a pregnant woman is entitled to receive. *Id.* at 476. Such a statute impinges directly on a protected activity and requires strict scrutiny. The district court appears to have examined only the "degree" of state interference which each provision of the Akron statute imposed upon the abortion decision. It is clear that the *nature* of the interference must also be examined. *Maher* does not provide support for the claim that an ordinance such as the one now before us may be tested by a more lenient standard. We accept the statements of the Supreme Court that its later cases do not represent a retreat from the *Roe* v. *Wade* holding that the state's right to regulate abortions, at each stage of pregnancy, must rest on a compelling and legitimate state interest. *E.g.*, *Maher* v. *Roe*, *supra*, 432 U.S. at 475.

---

[3] The record-keeping requirement was characterized by the Court as one which "approach[ed] impermissible limits" of a state's ability to regulate during the first trimester. 428 U.S. at 80.

C.

Consideration of these decisions leads to the conclusion that a two-step analysis is required. First, the nature of the particular regulatory provision must be considered. If it causes no "legally significant impact or consequence" on the right of a pregnant woman, in consultation with a physician, to choose to terminate her pregnancy, it does not raise a constitutional issue. The particular provisions of the Missouri statute (written consent and record keeping) which produced the *Danforth* language relied upon by the defendants here, and the entire thrust of the statute in *Maher*, were of this kind. Only if the provision does result in such significant impact or consequence must a second inquiry be made to determine whether or not the regulatory provision serves a legitimate and compelling state interest. If a compelling state interest is found, the regulation must be examined further to determine whether it imposes an "undue burden" on the abortion decision, that is, whether it is sufficiently narrowly drawn.

We believe the district court applied the test of whether a provision "unduly burdens" the abortion decision at the wrong stage of its inquiry. Once it is found that a regulation constitutes "direct state interference with a protected activity," *Maher, supra,* 432 U.S. at 475, here the right of a pregnant woman to have an abortion, that regulation is subject to strict scrutiny. Only then, in the process of balancing the interest of the state against the method chosen to deal with it, does the "unduly burdensome" factor become important. Since the state has no compelling interest during the first trimester of pregnancy, no balancing is required. If a regulation results in a legally significant impact or consequence on a first trimester abortion decision, it is invalid. *See Roe* v. *Wade, supra,* 410 U.S. at 163. Further, even though a regulation may relate to a stage of pregnancy during which the state has a compelling interest, nevertheless, the method chosen to effectuate that interest may fail if it unduly burdens the decision to obtain an abortion. As the Court said in *Charles* v. *Carey,* 627 F.2d 772, 777 (7th Cir. 1980), "the term 'undue burden' defines the ultimate constitutional issue, not merely the threshold requirement for strict scrutiny."

III. Provisions Affecting All Abortions

We look first at those provisions of the ordinance which apply to all abortions, which necessarily include those performed during the first trimester. Our initial inquiry is to determine if any of them directly interfere with the right of a pregnant woman and her physician to decide whether she should obtain an abortion. As the Supreme Court recently reemphasized in *Colautti* v. *Franklin,* 439 U.S. 379, 387 (1979), this is in all respects a medical decision "up to the point where important state interests provide compelling justifications for intervention . . . ."

A. Parental Notice and Consent[4]

The district court held sections 1870.05(A) (parental notice) and 1870.05(B) (parental consent) invalid. Though the original defendants did not appeal these holdings, the intervenors have done so. The intervenors argue that the fundamental right of parents "to control, educate, nurture and guide the actions of their minor children" is one which the state is constitutionally empowered to protect. This right has been recognized recently by the Supreme Court in connection with abortion regulations in *Danforth, supra,* 428 U.S. at 73; *Bellotti* v. *Baird,* 443 U.S. 622, 637-39 (1979); and *H. L.* v. *Matheson,* — U.S. —, 49 U.S.L.W. 4255, 4258 (March 23, 1981). While parental rights were recognized, the Court held that a "blanket" provision requiring consent of a parent or person standing *in loco parentis* may not be imposed as a condition for abortion of an unmarried minor during her first twelve weeks of pregnancy. *Danforth,* 428 U.S. at 74. In

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[4] Akron Ordinance No. 160-1978, Ch. 1870

1870.05 NOTICE AND CONSENT

(A) No physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intenton to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of the parents or guardian, computed from the time of mailing, unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman.

(B) No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter and

(1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or

(2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

Bellotti, 443 U.S. at 643, the Court noted "the unique nature and consequences of the abortion decision" which make it inappropriate, on the basis of deference to parental rights, to provide a possible third-party veto over the decision of the pregnant woman and her doctor to terminate the patient's pregnancy. We believe the district court correctly applied these principles in finding section 1870.05(B) unconstitutional. *See Wynn* v. *Carey*, 582 F.2d 1386, 1390 (7th Cir. 1978); *Margaret S.* v. *Edwards*, 488 F.Supp. 181, 202-03 (E.D. La. 1980); *Planned Parenthood Association of Kansas City* v. *Ashcroft*, 483 F.Supp. 679, 687 (W.D. Mo. 1980).

The decision in *H. L.* v. *Matheson, supra*, requires a different treatment of section 1870.05(A). The Utah statute there involved required a physician to "[n]otify, if possible, the parents or guardians of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married." 49 U.S.L.W. at 4256. Because the plaintiff in *H.L.* was an unmarried fifteen-year old who resided at home and was dependent on her parents the only decision of the Court was that the Utah statute was not facially unconstitutional when questioned by one in her circumstances. Justices Stewart and Powell were two of the six Court members who made up the majority. In a separate concurrence these Justices emphasized that the opinion of the Court did not decide "whether [the Utah statute] unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification." 49 U.S.L.W. at 4259 (Powell, J., concurring).

The plaintiffs in the present case are abortion clinics and a physician. No minor female is questioning the validity of the Akron ordinance. The intervenors who appealed the portion of the district court judgment finding section 1870.05(A) invalid are parents of unmarried minor daughters. Neither the maturity nor condition with respect to emancipation of these minors is shown. The decision of the Supreme Court leads to the conclusion that section 1870.05(A) is a constitutionally permissible regulation insofar as it applies to immature minors who live with their parents, are dependent upon them and are not emancipated by marriage or otherwise. Until the requirements of section 1870.05(A) are questioned by a minor who claims to be mature or emancipated or claims that notice would not be in her best interest, we cannot hold the section facially invalid. The finding that section 1870.05(A) is unconstitutional is reversed.

B. Informed Consent[5]

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[5] Akron Ordiance No. 160-1978, Ch. 1870

1870.06 INFORMED CONSENT

(A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05 (B) of this Chapter, given freely and without coercion.

(B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows:

(1) That according to the best judgment of her attending physician she is pregnant.

(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.

(3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.

(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and

The plaintiffs have not appealed from the district court's ruling that the general informed consent requirement of section 1870.06(A) is valid. However, the defendants contend on appeal that the district court erred in holding section 1870.06(B) unconstitutional in its entirety. They argue that the subsections within 1870.06(B) should be considered separately and that only those requirements which fail to pass constitutional scrutiny, when considered individually, should be voided. We believe the district court properly considered

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that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

(5) That abortion is a major surgical procedure, which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

(6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(C) At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

(D) The attending physician performing or inducing the abortion shall provide the pregnant woman, or one of her parents or legal guardian signing the consent form where applicable, with a duplicate copy of the consent form signed by her, and one of her parents or her legal guardian where applicable, in accordance with Paragraph (B) of this Section.

section 1870.06(B) as a unit and correctly concluded that the provision setting forth detailed and specific information which must be given to each abortion patient by the attending physician is impermissible. The requirements of section 1870.06 (B) impose "restrictions or regulations governing the medical judgment of the pregnant woman's attending physician with respect to the termination of her pregnancy." *Danforth,* 428 U.S. at 80. Such restrictions or regulations are not permitted during the first trimester of pregnancy. The district court correctly held section 1870.06(B) invalid, not because it would burden the physician, but because its effect would be to encumber the exercise of the patient's constitutionally protected right "by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision." *Whalen* v. *Roe,* 429 U.S. 589, 604 n. 33 (1977).

The district court concluded that section 1870.06(C) serves a valid state interest in the health of its female citizens. This section requires counseling by the attending physician and specifies that the physician must advise the patient of the particular risks associated with her own pregnancy and with the abortion technique to be employed. The district court determined that the state could rationally conclude that this counseling should be done by the attending physician rather than another individual.

Section 1870.06(C) impinges on the medical judgment of the attending physician in exactly the same way as section 1870.06(B). It requires the doctor to make certain disclosures in all cases, regardless of his own professional judgment as to the desirability of doing so. Such a requirement is clearly invalid for first trimester abortions. The district court appears not to have considered the nature of the restriction imposed by the section, but only the degree. This was error. Further, the district court required only that the state demonstrate a "valid" interest in maternal health as justification for section 1870.06(C). A compelling state interest must exist to support a legally significant intrusion into the abortion decision. Finally, even assuming the existence of a compelling state interest, the district court failed to require the defendants to demonstrate that the requirements of section 1870.06(C) are narrowly drawn to serve that interest. As has been stated, the practice of all three plaintiff clinics has been for the counseling to be conducted by persons other than the doctor who performs the abortion. In the absence of a showing that the state's compelling interest in maternal health would be served by a requirement that such counseling be done by the attending physician, this section is invalid.

Rather than attempting to show the existence of a compelling state interest in the regulation, the defendants argue that the reqiurements of section 1870.06(C) are reasonable and do not unduly burden the abortion decision. We believe section 1870.06(C) suffers from the same infirmities as section 1870.06(B). It seeks to impose a requirement which is unsupported by a compelling state interest but has the effect of encumbering the exercise of the pregnant woman's constitutional right.

It is possible that some of the individual requirements of sections 1870.06(B) and (C) could be successfully defended. *See, e.g., Charles* v. *Carey, supra; Margaret S.* v. *Edwards, supra; Planned Parenthood Association of Kansas City* v. *Ashcroft, supra.* As written, however, they have the effect of going far beyond the valid requirement of section 1870.06(A) and extending the permissible reach of the informed consent provision. We affirm the holding of the district court that 1870.06(B) is invalid and reverse the holding that 1870.06(C) is constitutional.

C. Waiting Period

Section 1870.07 requires a 24-hour waiting period between the time a pregnant woman signs the consent required in section 1870.06(A) and the time an abortion may be performed.

In upholding the validity of this provision, the district court relied primarily upon this court's decision in *Wolf* v. *Schroering*, 541 F.2d 523 (6th Cir. 1976). The district court acknowledged that there was no claim in *Wolfe* v. *Schroering* that this particular regulation significantly burdened the abortion process. *Id.* at 526. In the present case the plaintiffs argue that the waiting period requires an additional trip to the clinic, making the process more expensive, imposes impermissible physical and psychological burdens on a woman seeking a first trimester abortion, and is not narrowly drawn to achieve a lawful objective.

Since section 1870.07 causes a legally significant impact or consequence on the abortion decision, it cannot be applied to first trimester abortions. Assuming some state interest in postponing abortion decisions, the evidence falls far short of establishing a compelling interest which is served by the requirement. The obvious effect of the requirement is to impose upon the process of obtaining an abortion a delay which has no medical basis. Though there was evidence that a period of delay before surgery is often beneficial, there was none that an inflexible requirement of a 24-hour waiting period for an abortion serves any interest of the state, much less a compelling interest which is required under strict scrutiny analysis. Medical witnesses for the defendants testified that a reasonable "work-up" time is customary and often necessary prior to surgery. However, none related this in-hospital practice to the very brief procedures involved in early stage abortions.

The unstated purpose of section 1870.07 is to require a "cooling off period" during which second thoughts might come into play. The district court appears to have recognized this effect:

> The state interest furthered by the waiting period requirment is the insurance that a woman's abortion decision is made after careful consideration of all the facts

> applicable to her particular situation. This is an important state interest considering the irreversible nature and possible lasting consequences of the abortion decision.

479 F.Supp. at 1204.

Desirable as such careful consideration may be, it is beyond the state's power to require. *Charles* v. *Carey, supra,* 627 F.2d at 785-86; *Margaret S.* v. *Edwards, supra,* 488 F.Supp. at 212-13. We reverse the holding that section 1870.07 is constitutional.

IV. The Second Trimester "Hospital Only" Requirement

Section 1870.03 requires every abortion subsequent to the end of the first trimester of pregnancy to be performed in a hospital. In *Roe* v. *Wade,* the Supreme Court found that "in the light of present medical knowledge," the state's legitimate interest in the health of the expectant mother became compelling at approximately the end of the first trimester. 410 U.S. at 163. In that decision the Court gave as one specific example of a constitutional regulation a requirement that abortions subsequent to the first trimester be performed in hospitals. *Id.*

The thrust of the plaintiffs' proof in the present case was to the effect that a procedure known as dilatation and evacuation (D & E), requires a reexamination of certain assumptions of the Court in *Roe* v. *Wade.* In effect they argue that the use of D & E makes abortion through the 17th or 18th week of pregnancy safer than childbirth. Thus, under *Roe* v. *Wade,* the state's interest in maternal health does not become compelling before that time because "mortality in abortion may be less than mortality in normal childbirth." 410 U.S. at 163. By requiring early second trimester abortions to be performed in a more expensive and less convenient setting than outpatient clinics, they contend the state has impermissibly burdened the constitutional rights of pregnant women seeking such abortions. Since there is no compelling state interest at stake before that time, the plaintiffs assert that a regulation requiring abortions to be performed in a hospital prior to the 17th or 18th week of pregnancy does not meet the constitutional requirement that it be narrowly drawn so as to relate only to the state's legitimate interest.

There was an abundance of evidence that D & E is the safest method of performing post-first trimester abortions today. Two qualified physicians testified that it is safe to perform D & E abortions in an out-patient clinic through the 17th or 18th week of pregnancy. One of these witnesses stated that the plaintiff Akron Women's Clinic is adequately equipped and staffed to perform early second trimester abortions. The defendants presented an expert medical witness with unchallenged qualifications who recognized that abortion is "not a static situation" and that there is support for the opinion that early second trimester abortions may be performed safely outside of hospitals. Nevertheless, this witness stated that this proposition "is not clearly established." Furthermore, he testified that the American College of Obstetricians and Gynecologists has made no change in its 1973 recommendation that second trimester abortions be performed only in hospitals.

Evidence of the burden imposed by the requirement of section 1870.03 related to two factors. There was unrebutted testimony that there were only two hospitals in Akron in which second trimester abortions were being performed. During the year preceding trial, only nine such abortions were performed in these two hospitals. It was testified that approximately 10% of the 6,000 women who sought abortions at the Akron clinics during the same period were in their second trimester of pregnancy. Many of these women were referred to clinics in Cleveland, Ohio and in the State of Michigan. Those who were unable to travel to those places were faced with the choice of carrying the baby to term, attempting self-abortion or seeking illegal abortions. The mortality and morbidity incidence of self-abortions and illegal abortions greatly exceeds that of the second trimester D & E procedure.

The second burdensome feature of the in-hospital requirement is the cost. It was testified that a second trimester abortion in a hospital costs $850 - $900, while total charges for a D & E abortion in a clinic are $350 - $400.

The plaintiffs argue that the effect of section 1870.03 is to make second trimester abortions completely unavailable for many women who desire them. Many pregnant women, especially the very young, do not seek an abortion until they have entered the second trimester. Without the ability to travel and the funds to pay for hospital treatment, many of these Akron women have no real opportunity to obtain an abortion.

In its first ruling the district court held that the plaintiffs did not have standing to challenge section 1870.03. However, upon reconsideration the court concluded that the plaintiffs did have standing, and it addressed the merits of the respective positions of the parties. Referring to the decision in *Roe* v. *Wade*, the district court stated:

> The Court further recognized that the state had a valid interest in maternal health and the protection of potential human life. The state's interest in potential human life was found to become "compelling" at viability. The state's interest in protecting maternal health, "in the light of present medical knowledge," was found to become "compelling" at approximately the end of the first trimester. *Roe, supra* at 163, 93 S.Ct. at 731. Section 1870.03 was passed in furtherance of this asserted compelling state interest in protecting maternal health from the close of the first trimester of pregnancy.

479 F.Supp. at 1215.

It then concluded:

> Plaintiffs' attack Section 1870.03 saying that although abortions beyond the end of the first trimester of pregnancy were safer in a hospital setting at the time of the *Roe* decision, that is no longer true. Plaintiffs presented

> evidence in the form of testimony and exhibits to support a finding that early second trimester clinical abortions are now just as safe as early second trimester hospital abortions. The Court, however, does not find plaintiffs' evidence on this issue so convincing that it is willing to discard the Supreme Court's formulation in *Roe*. Accordingly, the Court finds that Section 1870.03 furthers the compelling state interest in protection of maternal health and is, therefore, constitutional.

Id.

At least two district courts have recently determined that the state's interest in the health of a pregnant woman does not become compelling until the 18th week of pregnancy. *Margaret* S. v. *Edwards, supra; Planned Parenthood Association of Kansas City* v. *Ashcroft, supra*. Both holdings were based on findings that widespread use of the D & E method represents a medical advance which makes abortion during early weeks of the second trimester sufficiently safe to eliminate maternal health as a basis for state interference. In each case the district court also found that no hospital in the region was performing post-first trimester abortions. The unavailability of in-hospital D & E abortions in the area resulted in pregnant women and their physicians being forced to use a more dangerous method, in the view of these courts. Both courts relied upon the fact that a ban on the use of the saline instillation method, which resulted in a similar denial of access to abortions, was held unconstitutional in *Planned Parenthood of Missouri* v. *Danforth, supra.*

The rationale of these decisions appears persuasive. However, the Supreme Court has now affirmed a 3-judge district court decision which found a provision identical to § 1870.03 constitutional. *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F.Supp. 894, 896-902 (N.D. Ind. 1980), *aff'd sub nom. Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*, — U.S. —, 49 U.S.L.W. 3799 (No. 80-1275, decided April 27, 1981). Many of the same arguments for holding the requirement that all second trimester abortions be performed in a hospital unconstitutional which were made in the present case were made by the plaintiffs in *Gary-Northwest.* Though the evidence on this issue in the present case was more detailed than that produced in *Gary-Northwest,* the thrust of the plaintiffs' proof and argument was the same. The Supreme Court has now had an opportunity to retreat from the "bright line" drawn in *Roe* v. *Wade* and has declined to do so. The district court's holding that section 1870.03 is constitutional is affirmed.

V. Standing

A.

The district court held that none of the plaintiffs had standing to contest section 1870.04 which forbids abortions after viability except to prevent the death or impairment of the health of the pregnant woman. None of the plaintiffs performed abortions after the first trimester and the district court denied permission to a pregnant woman and an Akron doctor who did perform post-first trimester abortions to proceed under pseudonyms. The plaintiffs argue that these persons would have had standing to attack section 1870.04 if they had been permitted to proceed. On the record before us we cannot say it was an abuse of discretion to deny the requests to proceed by pseudonym.

A more serious challenge to the standing ruling is contained in the contention of the plaintiffs that the physician-plaintiff should have been granted *jus tertii* standing to represent pregnant women who desire abortions after viability, but who were not before the court. The plaintiffs rely principally upon *Singleton* v. *Wulff,* 428 U.S. 106 (1976), where two doctors were found to have standing to assert the rights of their patients. In *Singleton* the doctors sought a holding that a statute which denied Medicaid benefits for non-medically indicated abortions was unconstitutional. The physician-plaintiffs were actually performing abortions for needy patients and were being denied payment for their services because of the statutory provision in question. In upholding the claim of standing, the Court made two distinct findings – that the plaintiff-doctors suffered "concrete injury" from operation of the statute, *Id.* at 113, and because of the close relationship between them and their patients, the doctors were "uniquely qualified" to test the statute on behalf of their patients. *Id.* at 117. Though the plaintiff-doctor in the present case might see and counsel women who desire an abortion after viability, it is clear that he would not perform the abortion.

The district court recognized the principle of *jus tertii* standing:

> Cases involving *jus tertii* (the right of a third party) standing can generally be divided into two categories. The first involves litigants who challenge legislation which imposes regulations upon them and, as a result of the regulations imposed, allegedly deprives third parties of constitutional rights. The second category involves litigants who suffer injury because regulations allegedly impairing constitutional rights of third parties are imposed directly on those third parties whose rights the litigants seek to assert. This case is within the first category. That is, plaintiffs allege that regulations imposed directly on them violate rights guaranteed their patients. Such plaintiffs "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function."

479 F.Supp. at 1184 (citations omitted).

However, denial of such standing to the plaintiff-physician was properly based upon the fact that he had never even expressed a desire to perform a post-viability abortion. Thus, this plaintiff suffered "no injury in fact" from the operation of section 1870.04. Failing to meet this requirement, the plaintiff did not have "a sufficiently concrete interest in the outcome" of this action to make it a case or controversy under Article III of the Constitution. *Singleton* v. *Wulff, supra,* 428 U.S. at 112 (plurality opinion). *See also,* concurring opinion of Mr. Justice Stevens, 428 U.S. at 121. Lacking such interest in the outcome, he did not have standing to assert the claims of others despite his claimed "close relationship" with women whom he counseled and whose rights he was seeking to protect. The holding of the district court that no party demonstrated standing to challenge the constitutionality section 1870.04 is affirmed.

B.

The defendants dispute the standing of Dr. Bliss, the physician-plaintiff who remained in the case. Dr. Bliss does not reside in Akron, but has performed first trimester abortions at one of the plaintiff-clinics. He testified that he expected to continue to do so. The district court correctly held that Dr. Bliss has standing as a plaintiff in this case.

VI. Disposal of Remains

With respect to section 1870.16, relating to disposal of fetus remains, we agree with the district court that the language is impermissibly vague as definition of a criminal act. The City defendants have urged us to void only the word "humane," arguing that the words "in a . . . sanitary manner" are sufficiently clear. If the City desires to legislate on this subject it should do so either by enacting specific requirements or by referring to regulations which set forth the requirements with specificity. The possibility that the language of section 1870.16 might be construed to mandate some sort of "decent burial" of an embryo at the earliest stages of formation is too real to be overlooked. The district court correctly found section 1870.16 invalid on grounds of vagueness..

The judgment of the district court is affirmed in part and reversed in part. No costs allowed.

KENNEDY, Circuit Judge. Concurring in part and dissenting in part. I respectfully dissent from part II (standard of review), that portion of IIIA relating to minors under 15, and a portion of IIIB of the majority's opinion.

The District Court ruled that abortion regulations that do not absolutely prohibit or afford the power to veto a woman's decision to have an abortion may withstand constitutional scrutiny though furthering something less than a "compelling" state interest. It held that regulations that interfere with a woman's privacy to a lesser degree may be weighed against any valid state interests furthered by the regulation. The majority, rejecting the District Court's standard, would apply a two-step test. First, if the provision in question causes no "legally significant" impact on the right of a pregnant woman to choose to terminate her pregnancy, it is constitutional. Second, if it causes a legally significant impact, the provision must be supported by a compelling state interest and must be sufficiently narrowly drawn so as not to unduly burden the woman's right. Because I am less certain than the majority that the Supreme Court's abortion decisions call for such a two-step analysis, I am not able to concur with the panel even though I do not completely agree with the District Court either.

Because there appears to have been some shift on the issue in the Supreme Court's decisions a lengthy and detailed review of its cases is required. Language from the earliest abortion decisions supports the majority's conclusion that only a compelling state interest will justify significant first trimester abortion regulation. In *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court spoke broadly in invalidating a statute that absolutely prohibited abortions except to save the life of the mother:

> Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest" . . . and

> that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake.

Id. at 155 (citations omitted).

> [Because the interest in maternal health becomes compelling at the end of the first trimester], [i]t follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation relates to the preservation and protection of maternal health. . . .
>
> This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.

Id. at 163.

> Up to [this point], the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[1]

Id. at 166.

In the next case, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), the Court appears to be ambivalent as to the proper standard of review, though the case signals at least some retreat from the broad language of *Roe*. In relevant part the Court held that Missouri could not give an absolute veto over a woman's abortion decision to the woman's spouse or parents. However, Missouri could impose record keeping requirements on an abortion clinic that it did not impose for other surgical procedures; the record keeping requirement did not have a "legally significant" impact on the abortion decision or the physician-patient relationship. *Id.* at 81.[2] Thus far *Planned Parenthood* is consistent with both the District Court's and the majority's test.

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[1] The Supreme Court did not use the word "significant" to distinguish permissible and impermissible first trimester regulation in *Roe* v. *Wade*. Indeed, the Court's language prohibited *all* first trimester abortion regulation. However, even in *Roe* the Court, without explanation, permitted a state to proscribe any abortion not performed by a physician. 410 U.S. at 165.

In the course of its opinion in *Planned Parenthood* the Court quoted language from *Roe* v. *Wade* that can be used to support the majority's test:

> "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," without interference from the State.

Id. at 61.[3]

On the other hand, the Court held that Missouri could require that the woman consent in writing to the abortion procedure, though such a requirement was not imposed for other types of surgery, because "[t]he decision to abort, indeed, is an important, and often a stressful one . . . ." *Id.* at 67. It is possible that such a consent requirement is

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[2] This is apparently the basis for the threshold requirement of "legal significance" in the majority's test. However, because the term "legally significant" as used by the Supreme Court did no more than state a conclusion, it is not helpful in *reaching* a conclusion.

[3] The Court recently quoted from *Roe* to the same effect in invalidating a statute which required a certain abortion technique where the fetus "may be viable":

> . . . up to the points where important state interests provide compelling justifications for intervention, "the abortion decision in all its aspects is inherently, and primarily, a medical decision" . . . .

Colautti v. *Franklin*, 439 U.S. 379, 387 (1979).

Insofar as this language suggests that no regulation of abortion is permitted before the end of the first trimester absent a compelling justification, it supports the majority's standard. However, since the purpose of *Colautti* was to emphasize the central role of the physician in the abortion decision, and other Supreme Court cases, *infra*, indicate that *Roe* did not prohibit all such first trimester regulation, the quote is entitled to little weight on the issue of the standard of review.

"legally insignificant," or "furthers a compelling state interest," and the Supreme Court's holding is therefore consistent with the standard developed by the majority. However, the Court did not analyze the requirement in this way. Indeed, in *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*), the Court stated that *Planned Parenthood* held the consent requirement constitutional because it did not "unduly burden" the right to seek an abortion.

At issue in *Bellotti I* was the constitutionality of a Massachusetts statute requiring parental consent to abortions for unmarried minors. The Supreme Court remanded the case so the district court could get an authoritative construction of the statute from the Massachusetts Supreme Judicial Court. The Supreme Court stated that it did not need to determine the point at which review of a woman's consent or of good cause for an abortion in the case of a minor becomes "unduly burdensome," 428 U.S. at 148, or whether a court hearing to determine whether informed consent was given would "unduly burden" the rights of an adult. *Id.* at 147. No mention is made in *Bellotti I* of any compelling state interest. Again, the facts of *Bellotti I* do not militate against either the majority's or the District Court's standard. However, the Supreme Court's language indicates that the panel's formulation is incorrect.

Maher v. *Roe*, 432 U.S. 464 (1977), held that the Constitution does not require states to fund non-therapeutic abortions. The Supreme Court observed that the court below had read *Roe* v. *Wade* and progeny

> as establishing a fundamental right to abortion and therefore concluded that nothing less than a compelling state interest would justify Connecticut's different treatment of abortion and childbirth. We think the District Court misconceived the nature and scope of the fundamental right recognized in *Roe*. . . . We held [in *Roe*] that only a compelling state interest would justify such a sweeping restriction on a constitutionally protected interest,

> and we found no such state interest during the first trimester. . . . In subsequent cases, we have invalidated other types of restrictions different in form but similar in effect, on the woman's freedom of choice. . . . Although a state-created obstacle need not be absolute to be impermisible . . . we have held that a requirement for a lawful abortion "is not unconstitutional unless it *unduly burdens* the right to seek an abortion." . . . As *Whalen* [v. *Roe,* 429 U.S. 589, 599-600] makes clear, the right in *Roe* can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe* did not declare an unqualified "constitutional right to an abortion," as the District Court seems to think. Rather, the right protects the woman from *unduly burdensome* interference with her freedom to decide to terminate her pregnancy.

Id. at 472-474 (citations omitted) (emphasis added).

The Court also upheld Connecticut's requirement that a woman who sought state funding for a therapeutic abortion submit her request in writing and get the prior approval of the Connecticut Department of Social Services. *Id.* at 480. The Court found the requirement reasonable although there was no similar requirement for other forms of surgery because "such [other] procedures do not involve the termination of a potential human life." *Id.*

The majority distinguishes *Maher* by pointing out the Supreme Court's emphasis that the case did not involve limitations on the right to an abortion. While true, this means only that the *facts* of *Maher,* like the *facts* of *Roe* v. *Wade, Planned Parenthood,* and *Bellotti I,* do not determine the correct standard. The majority also attaches significance to language in *Maher* in which the Supreme Court states that its "conclusion signals no retreat from *Roe* or the cases applying it." *Id.* at 475. The majority interprets this as signalling "that the [Supreme Court's] later cases do not represent a retreat from the *Roe* v. *Wade* holding that the state's right to regulate abortions, at each stage of pregnancy, must rest on a compelling and legitimate state interest." However, when the Court in *Maher* announced that it was not retreating from *Roe*, it meant only that it was not retreating from *Roe* as it had interpreted *Roe* in the preceding pages of its opinion in *Maher*, that is, to forbid "unduly burdensome" regulation of abortions.

In *Bellotti* v. *Baird*, 443 U.S. 622 (1979) (*Bellotti II*), the Court struck down a Massachusetts statute requiring parental consent to abortions for mature minors. The four-justice plurality framed the issue thus:

> The question before us — in light of what we have said in the prior cases — is whether [the statute], as authoritatively interpreted by the Supreme Judicial Court, provides for parental notice and consent in a manner that does not *unduly burden* the right to seek an abortion.

Id. at 640 (emphasis added).

The plurality concluded that as construed the statute

> would impose an *undue burden* upon the exercise by minors of the right to seek an abortion. . . . [U]nder state regulation such as that undertaken by Massachusetts, every minor must have the opportunity — if she so desires — to go directly to a court without first consulting or notifying her parents.

Id. at 647 (emphasis added).

The plurality added that "the constitutional right to seek an abortion may not be *unduly burdened* by state-imposed conditions upon initial access to court." *Id.* at 648 (emphasis added).

The requirement of either going to court or notifying one's parents is clearly a significant burden. Therefore, to be consistent with the panel's analysis the Supreme Court should have found a compelling state interest before inquiring whether the statute would unduly burden the right to seek an abortion. The plurality found the state's interest in encouraging a family resolution of a minor's abortion decision "important." *Id.* at 648. It never found the state's interest compelling.[4] Thus, while the result in *Bellotti II* may be consistent with the standard of review suggested by the panel the plurality's analysis is not.

Harris v. *McRae*, 48 U.S.L.W. 4941 (June 30, 1980), upheld as constitutional the Hyde Amendment, which forbade the use of federal funds for abortions. The Court stated:

> The doctrine of *Roe* v. *Wade*, the Court held in *Maher*, "protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy," *id.*, at 473-474, such as the severe criminal sanctions at issue in *Roe* v. *Wade, supra*, or the absolute requirement of spousal consent for an abortion challenged in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52.

Id. at 4945-4946 (emphasis added).

Again, the Supreme Court's language indicates that the panel's formulation is incorrect.

The most recent case to deal with abortions is *H.L.* v. *Matheson*, 49 U.S.L.W. 4255 (March 23, 1981), where the Court held constitutional a requirement that unmarried, immature minors under the age of 15 notify their parents of their decision to seek an abortion. The Court observed that the statute did not involve an absolute veto, and that it served "important considerations" and "significant state interests." *Id.* at 4259. The Court did not engage in the two-step analysis suggested by the panel.

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[4] It may be argued that the Court simply applies a different standard of review in the case of minors. However, the Court has not said that it does, and it is not clear why the standard of review, rather than the relative weights of the parties' interests, should change. The state's interests in the case of minors are weightier, and thus lead to a different outcome in the balancing process.

Thus, the Supreme Court has never suggested the analysis put forth by the majority. It has sometimes suggested that a compelling state interest is necessary to justify any state regulation of abortion during the first trimester, but that language has always been far broader than required by the facts before it. With the exception of the passage in *Colautti, supra,* and a part of *Planned Parenthood,* all of the cases since *Roe* have suggested that the proper standard is simply whether a regulation that does not effectively prohibit abortions is "unduly burdensome" to the decision whether or not to abort. The Court's decisions are all consistent with that standard. Although this standard is very close to that applied by the District Court, it differs in that the District Court required that the prohibition or veto be absolute before it must be justified by a compelling state interest.[5]

My resolution of the remaining issues, however, does not depend on whether I apply the majority's standard, that of the District Court, or what I perceive to be the Supreme Court's position.

Section 1870.05(B) requires for a minor under the age of 15 either consent of a parent or "an order from a court having jurisdiction over her that the abortion be performed or induced" as a condition of terminating pregnancy. The District Court invalidated section 1870.05(B) because it did not protect the abortion decision of a mature minor, and the majority affirms this decision. The District Court, however, made no attempt to construe section 1870.05(B) in a constitutional fashion.

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[5] *Charles* v. *Carey*, 627 F.2d 772, 777-778 (7th Cir. 1980), is not persuasive support for the majority's decision. The district court in that case held that a law that unduly burdens the abortion decision is subject to strict scrutiny. The Seventh Circuit held that "the term 'undue burden' defines the ultimate constitutional issue, not merely the threshold requiremnt for strict scrutiny." *Id.* at 777. With this statement I agree. I do not take the additional step of subjecting all regulations of abortion that are not *de minimis* to the compelling state interest standard.

The Seventh Circuit's concern that plaintiffs who must challenge abortion regulations on other than an across-the-board "compelling state interest" standard will be unable to anticipate the state's possible justifications for the regulations simply does not ring true in the abortion context. Nor do I share the Seventh Circuit's concern that the courts are incapable of determining when a burden on the abortion decision is "undue."

In *H.L.* v. *Matheson* the Utah statute required a minor's physician "to notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor. . . ." 49 U.S.L.W. at 4256. In an unrelated case the federal district court in Utah had held that this statute did not apply to unemancipated minors. *L.R.* v. *Hansen*, Civil No. C-80-0078J (Feb. 8, 1980). Because the minor who brought suit in *Matheson* did not show that she was mature or emancipated, she lacked standing to challenge the statute as applied to such minors, and the Supreme Court was "unwilling to assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors." 49 U.S.L.W. at 4257.

Similarly, in *Bellotti I*, the Supreme Court remanded for authoritative construction a statute that required parental consent to abortions for minors. "[I]n light of our disapproval of a 'parental veto' today in *Planned Parenthood,* we must assume that the lower Massachusetts courts, if called upon to enforce the statute pending interpretation by the Supreme Judicial Court, will not impose this most serious barrier." 428 U.S. at 151.

Section 1870.05(B) is capable of a construction that would render it constitutional. This would be the case if, for example, the order from "a court having jurisdiction" was based, as it constitutionally must be, first on an inquiry into the minor's maturity. Thus, the section is not facially invalid. As the majority notes in reversing the District Court's holding that section 1870.05(A) is unconstitutional, no minor challenges the Akron ordinance. I would not find section 1870.05(B) unconstitutional until a mature minor challenges it and until it has been construed by a lower court.

I also dissent from that portion of the panel's opinion which reverses the holding of the District Court that § 1870.06(C) is constitutional. This section requires that the attending physician advise the patient of

> the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or to carry her pregnancy to term.

The majority holds that this provision infringes on the medical judgment of the attending physician. The section does not, however, interfere with the patient's right to decide whether to terminate her pregnancy. *Cf. Colautti* v. *Franklin*, 429 U.S. at 392-394, 396 (1979; *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. at 64; *Roe* v. *Wade*, *supra*. Further, the witnesses who testified at trial agreed that the information should be given to the patient. Indeed, in *Planned Parenthood* v. *Danforth*, the Court stated that "[t]he decision to abort is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." 428 U.S. at 67. The Court considered that informed consent meant

> the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

Id. n. 8. The Utah statute at issue in *H.L.* v. *Matheson* provided that no abortion could be performed

> unless a "voluntary and written consent'" is first obtained by the attending physician from the patient. In order for such a consent to be "voluntary and informed," the

> patient must be advised at a minimum about available adoption services, about fetal development, and about foreseeable complications and risks of an abortion.

49 U.S.L.W. at 4256 n.1. In upholding this requirement, the Supreme Court simply noted that in *Planned Parenthood* v. *Danforth* "we rejected a constitutional attack on written consent provisions." *Id.* Thus, the Supreme Court apparently does not believe that the limited information required by .06(C) imposes an undue burden on the physician. The giving of such information enhances, rather than restricts, the woman's freedom of choice. "Informed consent" without this information would be worthless. *See also Wolfe* v. *Schroering*, 541 F.2d 523, 526 (6th Cir. 1976).

Plaintiffs' objection is not to the giving of the information, but rather to the requirement that the information be given by a physician. The Supreme Court has repeatedly recognized the importance of the physician-patient relationship to the abortion decision. Several times the Court has stated that during the first trimester the physician, in consultation with his patient, must be free to determine that in his medical judgment the patient's pregnancy should be terminated. *Bellotti II*, 443 U.S. at 641 n.21, 643; *Colautti* v. *Franklin*, 439 U.S. at 387; *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. at 61; *Roe* v. *Wade*, 410 U.S. at 163, 164. In *Planned Parenthood* the Court emphasized "participation by the attending physician [in the abortion decision] and his responsibility in that decision . . . ." 428 U.S. at 61. In *Roe*, the Court would have permitted a state to require that abortions be performed by a licensed physician, which at least strongly implies the state's interest in ensuring the existence of a physician-patient relationship. 410 U.S. at 165. As the Court observed in *Colautti*, "*Roe* stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out." 439 U.S. at 387.

The requirement that the information specified in .06(C) be given by a physician does no more than seek to ensure that there is in fact a true physician-patient relationship even for the woman who goes to an abortion clinic. The evidence presented at trial showed that the decision to terminate a pregnancy was made not by the woman in conjunction with her physician, but by the woman and lay employees of the abortion clinic, the income of which is dependent upon the woman's choosing to have an abortion. The testimony disclosed that the doctors at Akron Center's clinic did little, if any, counseling before seeing the patient in the procedure room. Akron's ordinance simply takes into account these realities of the "physician-patient" relationship at an abortion clinic.

I concur in the majority's conclusion that the 24-hour delay imposed by § 1870.07 is unconstitutional. However, the state has a strong interest in ensuring a carefully considered abortion decision, the 24-hour delay is substantially related to that state interest, and in many instances the delay imposes no undue burden on the right to an abortion. Nonetheless, .07 as it now stands is overbroad. For example, it would require a 24-hour delay even where the delay would impose a grave risk to the mental health of the pregnant woman, where the woman has already been counseled by a physician, or where the delay would cause such significant extra expense to an individual as to unduly burden if not effectively prohibit the decision. The Supreme Court requires closer attention to the circumstances of individual cases in the abortion context. *Bellotti II*, 443 U.S. at 643, n.23.

I concur in the balance of the majority's opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: June 12, 1981]

No. 79-3700/3701/3757

AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., *et al.*,
Plaintiffs-Appellants
Cross-Appellees,

v.

CITY OF AKRON, *et al.*,
Defendants-Appellees
Cross-Appellants,

FRANCOIS SEGUIN, *et al.*,
Intervenors
Defendants-Appellants.

Before: **LIVELY** and **KENNEDY**, Circuit Judges; and **GIBSON**, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in part and reversed in part.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Issued as Mandate: September 18, 1981

Costs: None

A True Copy. Attest: /s/ Gary McCarthy
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: July 10, 1981]

No. 79-3700
No. 79-3701
No. 79-3757

AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., *et al.*,
Plaintiffs-Appellants
Cross-Appellees,

v.

CITY OF AKRON, *et al.*,
Defendants-Appellees
Cross-Appellants,

FRANCOIS SEGUIN, *et al.*,
Intervenors
Defendants-Appellants.

Before: **Lively** and **Kennedy**, Circuit Judges; and **Gibson**,* District Judge.

ORDER

Upon receipt and consideration of the petition for rehearing filed herein by the plaintiffs-appellants, cross-appellees, Akron Center for Reproductive Health, Inc., et al., the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

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*The Honorable Benjamin F. Gibson, Judge, U.S. District Court for the Western District of Michigan, sitting by designation.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE CLERK

/s/ John P. Hehman
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: July 22, 1981]

No. 79-3700
No. 79-3701
No. 79-3757

AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., *et al.*,
Plaintiffs-Appellants
Cross-Appellees,

v.

CITY OF AKRON, *et al.*,
Defendants-Appellees
Cross-Appellants,

FRANCOIS SEGUIN, *et al.*,
Intervenors
Defendants-Appellants.

Before: LIVELY and KENNEDY, Circuit Judges; and GIBSON,* District Judge.

ORDER

The intervenors have filed a petition for rehearing directed to certain features of this court's opinion which was filed on June 12, 1981. Upon consideration of the petition for rehearing the court concludes that it raises no issues requiring reconsideration.

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*The Honorable Benjamin F. Gibson, Judge, U.S. District Court for the Western District of Michigan, sitting by designation.

Accordingly, the petition for rehearing of the intervenors is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C78-155A

[Filed: Aug. 22, 1979]

AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., *et al.*,
Plaintiffs,

v.

CITY OF AKRON, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

On February 28, 1978, the city council of Akron, Ohio, by a seven to six vote, passed Ordinance Number 160-1978, "amending and supplementing the Codified Ordinances of the City of Akron, Ohio, 1975, by the amendment of Chapter 1870, entitled 'Regulation of Abortions.'"[1] The ordinance represents an attempt to regulate the provision of abortions within the city of Akron without violating the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy. *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973). The problem presently before the Court is the determination of whether Akron has accomplished that goal.

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[1] The ordinance actually became law ten days later upon the mayor's failure to either sign or veto it. The full text of Ordinance 160-1978 is reprinted as the Appendix to this Opinion.

This Court is, of course, aware of the national controversy which has resulted from the Supreme Court's decisions in *Roe* and *Doe*. Analytically, however, this case is no different than the numerous others that come before the Court. It is the duty of this Court to determine the controversy before it based upon the requirements of the Constitution as expounded by the Supreme Court and the Court of Appeals for the Sixth Circuit.[2] In considering the present case, this Court has attempted to do just that, nothing more and nothing less.

I.

Ordinance Number 160-1978 provides extensive regulations of the provision of abortions. It also provides criminal sanctions for violation of its requirements. Section 3 of the ordinance established an effective date of May 1, 1978.

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[2] Mr. Justice Frankfurter, speaking in dissent to the Court's Opinion in *Board of Education v. Burnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting), stated:

> As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench.

On April 19, 1978, the present action challenging the ordinance was instituted. The Court granted plaintiffs' motion for a temporary restraining order "enjoining defendants and any of their employees, agents and servants from attempting to enforce Ordinance No. 160-1978. . . ." Subsequently, defendants consented to entry of a preliminary injunction pending the Court's decision on the merits.

The Court duly heard testimony and received exhibits. The following shall constitute findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure.

II.

The defendants in this action are the City of Akron, its Mayor, its Director of Public Health, and its Police Prosecutor. Plaintiffs are three Ohio corporations that operate out-patient abortion clinics within Akron and a physician who has performed abortions at one of those clinics.

On April 26, 1978, Doctor Francois Seguin and Patricia K. Black petitioned the Court for leave to intervene as defendants in a number of different capacities. The Court granted such leave to the extent of permitting petitioners' participation "solely in their individual capacity as parents of unmarried minor daughters of childbearing age. . . ."

A.

At the present time, the clinics operated by the corporate plaintiffs provide abortions only during the first trimester of pregnancy. The clinic coordinator of Akron Women's Clinic, however, indicated that if it were possible, that clinic would provide abortions during the early part of the second trimester of pregnancy. The reason that it is not now possible to provide abortions during the second trimester in a clinic setting is that Akron has had an ordinance requiring the performance of second trimester abortions in a hospital since some time prior to 1978. That ordinance is not now under attack.

The patients for whom the clinics provide their services range in age from about twelve years to approximately forty-five years. Two of the clinics provide abortions on three days a week (Wednesday, Friday, and Saturday) and the third provides abortions two days a week (Wednesday and Saturday).

Patients usually make their first contact with one of the clinics over the telephone. If a woman telephones and indicates that she desires an abortion and that her pregnancy has not progressed beyond the end of the first trimester, she will be given an appointment for one of the "procedure days." When the patient arrives at the clinic on the day of her appointment she is asked certain questions about her medical history and her pregnancy. She also participates in a group counseling session with counselors employed by the respective clinics. These counselors have varying degrees of qualifications, none, however, is a physician. During the group counseling session, the patients are given information concerning the procedure to be performed upon them, information on birth control techniques, and after-care instructions. At some time near the close of her group counseling session, each patient is asked to sign a document acknowledging her informed consent to the performance of an abortion.

A patient's first contact with the physician who is to perform the abortion procedure usually occurs when she is taken into the operating room. At that time, the physician reviews the patient's medical chart and asks the patient if she has any questions. The doctor then performs a pelvic examination. If the pelvic examination does not reveal any medical problems and, further, indicates that the pregnancy has not progressed beyond the first trimester, the abortion usually will then be performed. There was some evidence that if the physician sensed that the patient was ambivalent concerning her decision, he would suggest that she return at another time after she had had some additional time to consider alternatives to abortion.

The abortion method used at the clinics is dilation and suction curettage (D&C). The procedure itself takes approximately five minutes.

B.

The physician plaintiff is a resident of Cincinnati and primarily is engaged in the practice of medicine in that city. He has been licensed as a physician by the state of Ohio since 1957. He testified that his specialty is "Family Planning, which is really a subspecialty of Family Practice." As part of his practice, the physician plaintiff regularly performs abortions in Cincinnati.

Prior to the time the original complaint was filed in this action, the physician plaintiff had never performed abortions within Akron.[3] At some time prior to July 11, 1978, however, he received a telephone call from the clinic coordinator of Akron Women's Clinic. The coordinator proposed an arrangement whereby the physician plaintiff would occasionally substitute for her clinic's physicians when they were away from Akron or assist them during particularly busy times and they would, in return, do the same for him at his clinic in Cincinnati. She offered to pay his expenses to and from Akron plus a per procedure fee. The coordinator also inquired whether he would be interested in being a party to this action.

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[3] The physician plaintiff became a party to this action with the filing of the fourth amended complaint on July 28, 1978.

The physician plaintiff had been interested in finding a doctor who desired to enter into such a reciprocal arrangement for some time. He was, therefore, receptive to the coordinator's proposal. The opportunity to earn some additional income was also a factor that entered into his consideration. Finally, he concluded that he did want to participate in this action and felt that to do so it would be necessary for him to perform abortions in Akron.

The physician plaintiff first performed abortions in Akron on July 11, 1978. Between that date and the commencement of trial in this action, he performed abortions in Akron on one other occasion. At the time of trial, he anticipated performing abortions in Akron again during February of 1979 and thereafter as requested by Akron Women's Clinic's coordinator.

III.

The plaintiffs have challenged Ordinance Number 160-1978 on a number of different grounds. Some of their claims are addressed to the ordinance in its entirety and others are addressed to specific sections of the ordinance. Some of their claims are that the ordinance, or parts thereof, is invalid because it interferes with their constitutional rights as operators of clinics providing abortions within Akron and as a physician providing abortions within Akron; others are that the ordinance, or parts thereof, interferes with their provision of services to their patients in such a way as to infringe upon constitutional rights of those patients. Before proceeding to consideration of plaintiffs' numerous and varied claims, the Court deems it necessary to consider plaintiffs' standing. The discussion of plaintiffs standing consists of four areas: First, the Court will address an issue concerning the physician plaintiff's standing to raise any claims in this action; second, the Court will discuss general standards to be applied in determining plaintiffs' standing; third, the Court will determine if plaintiffs have standing to litigate the constitutionality of specific sections of the ordinance; finally, the Court will determine if plaintiffs have standing to litigate the constitutionality of the ordinance as a whole.

A.

As found above, a consideration that entered into the physician plaintiff's decision to begin providing abortions within Akron was his desire to be a plaintiff in this action. This fact raises the question of whether such a desire to "test" Akron's ordinance should disqualify the physician plaintiff from doing so, assuming that he otherwise has standing.

Initially, the Court notes that the physician plaintiff presented evidence that in addition to performing abortions in Akron prior to trial of this action, he fully intended to continue to do so at certain times in the future. Defendants presented no conflicting evidence on this question. Even though only injunctive relief is sought, therefore, the physician plaintiff's claims are not moot. *See Meyers v. Pennypack Woods Home Ownership Association,* 559 F.2d 894, 898 n.5 (3rd Cir. 1977).

Further, it is clear that even if the physician plaintiff's sole motivation for commencing to perform abortions within Akron had been his desire to participate in the present action, such motivation would not detract from his standing in this case. *Pierson v. Ray*, 386 U.S. 547, 558 (1967); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (per curiam); *Meyers v. Pennypack Woods Home Ownership Association*, *supra* at 898; *Smith v. YMCA*, 462 F.2d 634, 646 (5th Cir. 1972). Accordingly, if the physician plaintiff otherwise has standing to challenge any particular part of Ordinance Number 160-1978, he is not disqualified from doing so by whatever role his desire to participate in this action played in his decision to perform abortions in Akron.

B.

The determination of an individual's standing to litigate a particular claim involves two levels of inquiry. The first level is a result of the restriction of federal court jurisdiction to "Cases" and "Controversies" by Article III of the Constitution. That restriction establishes a floor below which neither the courts nor congress can afford an individual standing to litigate a particular claim. *See Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). In order to satisfy Article III's requirement, a plaintiff must have " 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth, supra* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)) (emphasis in original). "In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976).

In the present case, Ordinance Number 160-1978 imposes certain regulations upon clinics and physicians providing abortions within the City of Akron. Those regulations are enforced by criminal sanctions that defendants stand ready to enforce. Three of the plaintiffs operate clinics for the provision of abortions in Akron and the fourth is a physician at one of those clinics. Plaintiffs have alleged and proved that compliance with some of the regulations of the ordinance will result in their suffering economic harm. It is clear, therefore, that, to the extent Ordinance Number 160-1978 regulates specific activities in which these plaintiffs engage, they have standing, in the constitutional sense, to challenge the legality of that regulation.

The second level of inquiry into an individual's standing to litigate is founded upon prudential considerations. It is a matter of "judicial self-governance." *Warth,* 422 U.S. at 509. Among the standards in this context is that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth, supra* at 499. To the extent plaintiffs have satisfied Article III and seek to raise claims based upon alleged infringement of rights assertedly guaranteed to them, they may clearly do so. To the extent that plaintiffs seek to raise claims based upon alleged infringement of rights of their patients, however, it is necessary to consider whether there is reason to disregard the above quoted general standard.

Cases involving *jus tertii* (the right of a third party) standing can generally be divided into two categories. The first involves litigants who challenge legislation which imposes regulations upon them and, as a result of the regulations imposed, allegedly deprives third parties of constitutional rights. The second category involves litigants who suffer injury because regulations allegedly impairing constitutional rights of third parties are imposed directly on those third parties whose rights the litigants seek to assert. This case is within the first category. That is, plaintiffs allege that regulations imposed directly on them violate rights guaranteed their patients. Such plaintiffs "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren,* 429 U.S. 190, 192-97 (1976); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Barrows v. Jackson,* 346 U.S. 249 (1953); Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 432 (1974).[4]

Accordingly, to the extent that plaintiffs have alleged and proved that enforcement of parts of Ordinance Number 160-1978 will result in an injury to them and that such injury is likely to be avoided by a favorable decision of their specific claims, they will be permitted to litigate both claims of infringement of rights guaranteed them by the Constitution and claims of infringement of rights guaranteed their patients by the Constitution. When determining plaintiffs' standing to litigate each of their specific claims, therefore, it will only be necessary to inquire into their satisfaction of Article III.

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[4] Cases falling within the second category present much more difficult problems. *See Singleton v. Wulff,* 428 U.S. 106 (1976).

C.

The Court need next consider plaintiffs' standing to challenge the various individual sections of Ordinance Number 160-1978. As stated above, this consideration can be restricted to an inquiry of whether enforcement of the various sections will result in an injury to plaintiffs and whether that injury would be avoided by a declaration that such sections are unconstitutional. Inasmuch as plaintiffs seek only declaratory and injunctive relief, it is unnecessary to consider whether all of the plaintiffs have standing to challenge a particular section. Rather, a finding that at least one plaintiff has standing will be sufficient.

1.

Section 1870.02 requires all abortions to be performed by a physician "licensed to practice medicine in the State of Ohio and such abortion [shall be] performed in a hospital or an abortion facility." An "abortion facility" is defined by Subsection (G) of Section 1870.01 in such a way that it includes the clinics operated by the corporate plaintiffs. Further, the physician plaintiff and all other persons performing abortions at the clinics are "licensed to practice medicine in the State of Ohio." No plaintiff has expressed a desire to engage in any activity that would be violative of Section 1870.02. Plaintiffs are, therefore, without standing to challenge said section.

2.

Section 1870.03 provides that abortions "subsequent to the end of the first trimester" must be performed in a hospital. As found previously, no plaintiff now engages in the performance of abortions subsequent to the first trimester. As further found, the coordinator of Akron Women's Clinic has expressed a desire to provide abortions at that clinic during the early part of the second trimester. If Section 1870.03 were declared unconstitutional, however, such abortions could still not be performed in a clinic because of a preexisting Akron ordinance that is not here under attack. Plaintiffs, therefore, lack standing to challenge Section 1870.03.

3.

Subsection (A) of Section 1870.04 provides that a physician shall not perform a post-viability abortion unless "such abortion is necessary to prevent the death of the pregnant woman or to prevent impairment to her health." Such subsection further imposes certain requirements upon physicians who perform such post-viability abortions. "Viable" is defined by Subsection (D) of Section 1870.01 as "potentially able to live outside of the womb of the mother upon premature birth whether resulting from natural causes or an abortion, or otherwise, and whether that potentiality exists in part due to the provision or availability of natural or artificial life-support systems."

As found above, no plaintiff presently engages in the performance of abortions beyond the end of the first trimester. Further, the one plaintiff who expressed a desire to do so, would like to provide abortions only during the early part of the second trimester.[5] Much evidence was presented the Court concerning the earliest point in a woman's pregnancy at which viability was possible. It has not been suggested, however, that viability is possible during the early part of the second trimester. Accordingly, inasmuch as no plaintiff even desires to engage in post-viability abortions, plaintiffs lack standing to challenge subsection (A) of Section 1870.04.

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[5] Actually, in view of the Court's finding that plaintiffs have no standing to challenge Section 1870.03, the desire to perform abortions during the early part of the second trimester does not increase the standing of Akron Women's Clinic, Inc., beyond that

[footnote continued]

Subsection (B) of Section 1870.04 establishes a "presumption of viability" "if more than twenty-four (24) weeks have elapsed from the probable beginning of the last menstrual period of the pregnant woman . . . ." In such circumstances the subsection imposes certain requirements upon a physician performing an abortion. Inasmuch as no plaintiff has even expressed a desire to engage in activities within the coverage of this subsection, they lack standing to challenge it.

Subsections (C) and (D) of Section 1807.04, respectively, impose certain regulations upon abortions "where the presumption of viability exists," and "of a viable unborn child." Inasmuch as plaintiffs do not engage in the performance of such abortions, they lack standing to challenge these subsections.

4.

Subsection (A) of Section 1870.05 imposes a requirement of notification of a parent or guardian prior to

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of the other plaintiffs. In light of the fact, however, that even if Akron Women's Clinic, Inc., were able to effectuate its desire to perform abortions during the early second trimester, it would still lack standing to challenge the subsection now under discussion, the Court will analyze this subsection as though such effectuation were possible.

the performance of an abortion at the request of an unmarried woman below the age of eighteen. This requirement is imposed upon the attending physician. Inasmuch as the physician plaintiff's patients include women below the age of eighteen, he has standing to challenge this subsection.

Subsection (B) of Section 1870.05 imposes a parental consent requirement prior to the performance of an abortion upon a minor under fifteen years of age. The requirement of obtaining such consent is imposed directly upon the attending physician. Inasmuch as the physician plaintiff's patients include minors below the age of fifteen, he has standing to challenge this subsection.

5.

Section 1870.06 imposes "informed consent" requirements applicable to all abortion procedures. The physician plaintiff has standing to challenge this section.

6.

Section 1870.07 imposes a twenty-four hour waiting period applicable to all abortion procedures. The physician plaintiff has standing to challenge this section.

7.

Sections 1870.08 and 1870.09, respectively, impose recordkeeping and inspection requirements upon "abortion facilities." The corporate plaintiffs, as operators of such facilities, have standing to challenge these sections.

8.

Section 1870.10 imposes reporting requirements upon physicians performing abortions. The physician plaintiff has standing to challenge this section.

9.

Section 1870.11 imposes duties upon Akron's Department of Public Health concerning the provision of abortion report forms to abortion providers, complication report forms to post-abortion care providers, and provision of "a current list of all public and private agencies and services available for use in accordance with Section 1870.06(B)(11) and 1870.06(B)(12) of this Chapter," to abortion providers. Plaintiffs have not alleged or proved any injury as a result of this section. They are, therefore, without standing to challenge it.

10.

Section 1870.12 provides that certain other sections of the ordinance shall not apply "where there is an emergency need for an abortion to be performed. . . ." Plaintiffs have not alleged or proved any injury as a result of said section. They are, therefore, without standing to challenge it.

11.

Section 1870.13 provides that no municipal hospital shall permit its facilities to be used for the performance of abortions. Plaintiffs have not alleged or proved any injury as a result of this section. They are, therefore, without standing to challenge it.

12.

Subsection (A) of Section 1870.14 provides that no "private hospital, hospital director, or governing board of a private hospital . . ." is required to permit the performance of abortions within such hospital. Plaintiffs have failed to allege or prove any injury as a result of said subsection. They are, therefore, without standing to challenge it.

Subsection (B) of Section 1870.14 provides that refusal to perform or participate in the performance of an abortion or post-abortion care cannot be a "basis for disciplinary or other recriminatory action." Any injuries plaintiffs could possibly suffer as a result of this subsection are far too speculative to afford them standing to challenge it in this action.

13.

Section 1870.15 is as follows:

> No person shall experiment upon or sell a live child or unborn child unless such experimentation is therapeutic to the child or unborn child.

There was no evidence that any plaintiff engages in any activities that would be violative of this section or anticipates doing so in the future. Plaintiffs, therefore, lack standing to challenge Section 1870.15.

14.

Section 1870.16 provides that a physician who performs an abortion must "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." The physician plaintiff has standing to challenge this section.

15.

Section 1870.17 requires physicians who perform abortions to provide their patients with oral and written after-care instructions. The physician plaintiff has standing to challenge this section.

16.

Finally, Section 1870.18 imposes criminal sanctions for violation of the substantive sections of the ordinance. To the extent plaintiffs have standing to challenge the substantive sections, they have standing to challenge this section as well.

D.

As noted previously, some of plaintiffs' claims are addressed to Ordinance Number 160-1978 in its entirety, for example: "Chapter 1870 is as a whole invalid because its purpose was to put as many roadblocks as possible in a woman's path to an abortion, as a means of vindicating a belief that an abortion is the murder of an 'unborn child'." Plaintiffs' post-trial belief at 41. Plaintiffs argue that inasmuch as such claims have applicability to every section of the ordinance, if the Court agrees with their factual assertions, and further agrees that such facts would yield an unconstitutional enactment, it must strike the ordinance "in its entirety." Plaintiffs' characterization of their claims, however, does not relieve this Court of its duty to determine whether plaintiffs have Article III standing to attack the entire ordinance.

There are two ways in which plaintiffs could be found to have standing to attack the ordinance in its entirety. The first is that if plaintiffs were to be found to have standing to attack each section of the ordinance individually, they would have standing to attack the whole. Inasmuch as the Court has found plaintiffs lack standing to challenge certain sections individually, this alternative is foreclosed. The second way in which plaintiffs could be found to have standing to challenge the ordinance in its entirety would be by demonstrating that they are injured by some sections of the ordinance and those sections are not severable from the other sections. That is, that the ordinance must be viewed as one unit, not as a legislative scheme consisting of a number of separate units. *See Communist Party v. Subversive Activities Control Board,* 367 U.S. 1, 70-81 (1961); *Electric Bond Co. v. SEC,* 303 U.S. 419 (1938).[6]

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[6] As is apparent, plaintiffs' characterization of their claim as an attack on the ordinance "in its entirety" has no practical effect. If the ordinance is truly not severable, a finding that one section is unconstitutional will result in the striking of the entire ordinance regardless of whether the ground for the finding of unconstitutionality is generally applicable to the entire ordinance or whether its applicability is limited to only the one section originally found invalid. (Of course a plaintiff who is affected by one section of an inseverable statutory scheme will not be permitted to challenge the entire scheme based upon the alleged unconstitutionality of a section that has no applicability to him. "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines,* 362 U.S. 17, 21 (1960).) For this reason, examination of an enactment's severability usually occurs after a determination that some or all of the sections under primary attack are unconstitutional. Further, this Court's inquiry at this point into plaintiffs' standing to challenge the ordinance "in its entirety" must be viewed as only a preliminary determination. Severability is a question of fact. That is, the Court must determine legislative intent. At this point the question is simply what was the legislative intent at the time of enactment. If parts of the ordinance are striken, the Court must determine whether the legislature would wish the ordinance to remain without those specific invalid sections. At that point a

[footnote continued]

The question of whether the various parts of a legislative scheme are severable involves a determination of the legislative intent. In the present case, Section 1870.19, of Ordinance Number 160-1978 provides:

> Should any provision of this Chapter be construed by any court of law to be invalid, illegal, unconstitutional, or otherwise unenforcible, such invalidity, illegality, unconstitutionality, or unenforcibility shall not extend to any other provision or provisions of this Chapter.

Such a statement "provides a rule of construction which may sometimes aid in determining [legislative] intent." "But it is an aid merely; not an inexorable command." *Dorchy v. Kansas,* 264 U.S. 286, 290 (1924). "It has the effect of reversing the presumption which would otherwise be indulged, of an intent that unless the act operates as an entirety it shall be wholly ineffective." *Retirement Board v. Alton R.R. Co.,* 295 U.S. 330, 362 (1935).

Although some of the sections of Ordinance Number 160-1978 are closely related to others, all of the sections are not so intertwined that a finding that the ordinance must survive or fail as a single unit is dictated at this point. Accordingly, although plaintiffs have standing to challenge some sections of Ordinance Number 160-1978, the Court cannot now hold that they may challenge the ordinance "in its entirety." Those claims that plaintiffs assert have application to the ordinance as a whole, therefore, will only be considered insofar as they relate to the sections of the ordinance that the Court has found plaintiffs have standing to challenge individually.

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finding that such would not comply with the legislative intent would result in both a conclusion that plaintiffs have standing to challenge the entire ordinance and that it is invalid "in its entirety."

IV.

Plaintiffs have raised two claims that, they assert, are applicable to all of the sections of Ordinance Number 160-1978 that they have standing to challenge. The first such claim is that said sections violate the First Amendment's establishment of religion clause. The second such claim is that said sections violate the Fourteenth Amendment's equal protection clause.[7]

A.

The Supreme Court has established a three-prong test for analyzing the constitutionality of statutes alleged to be violative of the establishment clause:

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, *e.g., Epperson v. Arkansas,* 393 U.S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, *e.g., McGowan v. Maryland,* [366 U.S. 410 (1961)]; *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963), and, third, must avoid excessive government entanglement with religion, *e.g., Walz v. Tax Comm'n,* [397 U.S. 664 (1970)]. See *Lemon v. Kurtzman,* [403 U.S. 602,] 612-613 [(1971)]; *Tilton v. Richardson,* 403 U.S. 672, 678 (1971).

Committee For Public Education v. Nyquist, 413 U.S. 756, 773 (1973). Plaintiffs claim that the enactment under consideration fails all three prongs of this test.

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[7] Plaintiffs also appear to assert that their claim based on the First Amendment's free exercise clause and parts of their claim based on the Fourteenth Amendment's due process clause have general applicability. The Court, however, does not agree and each section will be tested individually to determine whether these claims have merit.

1.

Ordinance Number 160-1978 contains a number of "whereas" clauses. The fourth such clause is as follows:

> **Whereas**, it is the finding of Council that there is no point in time between the union of sperm and egg, or at least the blastocyst stage and the birth of the infant at which point we can say the unborn child is not a human life, and that the changes occurring between implantation, a six-weeks embryo, a six-month fetus, and a one-week-old child, or a mature adult are merely stages of development and maturation; . . .

Plaintiffs contend that the belief that human life exists from the time of union of sperm and egg is a religious belief. They further contend that although the above quoted clause is only one of a number of "whereas" clauses, the belief that human life exists from the time of union of sperm and egg was, in fact, the "true" motivation for the passage of Ordinance Number 160-1978. That is, city council hoped to "establish" the belief that human life exists from the union of sperm and egg. Finally, plaintiffs assert that inasmuch as this asserted religious purpose "was, in fact, what the provision's framers sought to achieve," the sections of the ordinance at issue are invalid. Plaintiffs' Post-Trial Brief at 72 (quoting *McDaniel v. Paty,* 435 U.S. 618, 636 n.9 (1978) (Brennan, J., concurring in judgment)). This Court disagrees with plaintiffs' assertions on this prong of the establishment test for at least two reasons.

First, the belief that human life exists from the union of sperm and egg is not clearly and singularly a "religious belief." An individual's belief of when life begins can be based upon scientific or philosophical belief rather than religious belief. *See Roe,* 410 U.S. at 159. For example, the physician plaintiff in this action testified before this Court as follows concerning the existence of human life from a point prior to the union of sperm and egg:

> There is no beginning of life. Life is a continuum. Life started possibly three and a half billion years ago.
>
> The only scientific answer as to when life begins, it is a continuum. There is no beginning.
>
> To refer to it as the moment when sperm and egg meet, it is important; but I would not consider that the beginning of life.

The fourth whereas clause is not inconsistent with the physician plaintiff's "scientific answer." This problem is further complicated by the fact that an individual's belief of when human life exists may be based not singularly upon religious, scientific, or philosophical theories, but upon some combination thereof. This Court cannot, therefore, find that the belief that human life exists from the union of sperm and egg is a "religious belief."[8]

Secondly, even if this Court were to agree that the statement that life exists from the union of sperm and egg is a statement of religious belief, it cannot agree with plaintiffs that it is necessary to look beyond any stated secular purpose in order to determine whether the "true" legislative motivation for enactment of the challenged ordinance was such religious belief.

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[8] The Court recognizes that plaintiffs' position may be that in the minds of the seven members of Akron City Council who voted in favor of Ordinance Number 160-1978, the belief that human life exists from the union of sperm and egg is clearly and singularly a religious belief. If this is plaintiffs' position, they certainly failed to prove their case in this regard. Further, the reasons discussed below that have led the Court to conclude that it is improper to inquire into what was "in fact" legislators' true motives for adopting certain legislation counsel even more strongly against permitting the bases for legislators' beliefs to be probed in a hope of discovering whether any particular belief is for that individual rooted in religion rather than in some other discipline.

The basis for plaintiffs' contentions is found in a footnote to Mr. Justice Brennan's concurring opinion to the judgment in *McDaniel v. Paty*, 435 U.S. 618, 636 n.9 (1978):

> Appellant has raised doubt that the purpose ascribed to the provision by the State is, in fact, its actual purpose. He argues that the actual purpose was to enact as law the religious belief of the dominant Presbyterian sect that it is sinful for a minister to become involved in worldly affairs such as politics, Brief for Appellant 58-59, and that the statute therefore violates the Establishment Clause. Although the State's ascribed purpose is conceivable, especially in light of the reasons for disqualification advanced by statesmen at the time the provision was adopted, *see ante*, at 622-625, if it were necessary to address appellant's contention we would determine whether that purpose was, in fact, what the provision's framers sought to achieve. In contrast to the general rule that legislative motive or purpose is not a relevant inquiry in determining the constitutionality of a statute, see *Arizona v. California*, 283 U.S. 423, 455 (1931) (collecting cases), our cases under the Religion Clauses have uniformly held such an inquiry necessary because under the Religion Clauses government is generally prohibited from seeking to advance or inhibit religion. *Epperson v. Arkansas*, 383 U.S. 97, 109 (1968); *McGowan v. Maryland*, 366 U.S. 420, 431-445, 453 (1961); cf. *Grosjean v. American Press Co.*, 297 U.S. 233, 250-251 (1936). In view of the disposition of this case, it is unnecessary to explore the validity of appellant's contention, however.

Although Mr. Justice Brennan's statement does imply the necessity of a determination of the "true" legislative motivation, such statement is dicta and this Court will not follow its implication for two reasons. First, the cases cited clearly do not demonstrate the necessity of such an inquiry. Secondly, such an inquiry is not supported by reason.

Mr. Justice Brennan cited two cases as directly supporting his thesis and a third as supporting "a proposition different from that in text but sufficiently analogous to lend support." The Harvard Law Review Ass., A Uniform System of Citation 7 (12th ed. 1976). The first case cited was *Epperson v. Arkansas,* 393 U.S. 97 (1968).

Epperson involved a challenge to Arkansas' 1928 "anti-evolution" statute. The challenged statute prohibited the teaching of the theory that man evolved from other species of life in the state's public schools and universities. The Supreme Court found the statute violative of the First Amendment's establishment clause.

There is language in the Court's opinion that, when viewed in isolation, appears to support Mr. Justice Brennan's thesis:

> The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes *for the sole reason* that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.
>
> * * *
>
> [The Arkansas statute's] antecedent, Tennessee's "monkey law," candidly stated its purpose: to make it unlawful "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended

> from a lower order of animals." Perhaps the sensational publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but *there is no doubt that the motivation for the law was the same*: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.

Epperson, 393 U.S. at 103, 108-09 (emphasis added) (footnotes omitted). When viewed in context, however, it becomes clear that the words chosen by the Court were not intended to relay the broad holding for which Mr. Justice Brennan cited *Epperson.*

The Court in *Epperson* did not decide that the Arkansas legislature's "true" motive for enactment of its challenged "monkey" law was religious rather than one of a number of possible secular purposes as plaintiffs ask this Court to do in the present case. Rather, the Court found no possible secular purpose to support the challenged statute and, from that finding, concluded that the legislature had to have acted based upon a religious motivation:

> No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.

Epperson, supra at 107-08 (footnotes omitted).[9] That this is the true significance of the Court's opinion in

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[9] A footnote appearing at the end of the above quoted sentences, again, could be read as implying the necessity for an extensive inquiry into the "true" motive for a particular piece of legislation:

[footnote continued]

Epperson becomes quite clear upon examination of a statement contained in Mr. Justice Black's concurring opinion:

> I find it difficult to agree with the Court's statement that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be

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The following advertisement is typical of the public appeal which was used in the campaign to secure adoption of the Statute:

"THE BIBLE OR ATHEISM, WHICH?

"All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children? The Gazette said Russian Bolshevists laughed at Tennessee. True, and that sort will laugh at Arkansas. Who cares? Vote FOR ACT NO. 1." The Arkansas Gazette, Little Rock, Nov. 4, 1928, p. 12, cols. 4-5.

Letters from the public expressed the fear that teaching of evolution would be "subversive of Christianity," *id.*, Oct. 24, 1928, p. 7, col. 2; see also *id.*, Nov. 4, 1928, p. 19, col. 4; and that it would cause school children "to disrespect the Bible," *id.*, Oct. 27, 1928, p. 15, col. 5. One letter read: "The cosmogony taught by [evolution] runs contrary to that of Moses and Jesus, and as such is nothing, if anything at all, but atheism. . . . Now let the mothers and fathers of our state that are trying to raise their children in the Christian faith arise in their might and vote for this anti-evolution bill that will take it out of our tax supported schools. When they have saved the children, they have saved the state." *Id.*, at cols. 4-5.

Again, however, when viewed in context, it does not appear that such an implication was intended. The Court did not examine the materials to which reference was made in an attempt to discover the "true" legislative purpose, rather, in its effort to find the statute constitutional, the Court examined the referenced materials in search of a possible secular purpose.

> the exclusive source of doctrine as to the origin of man." It may be instead that the people's motive was merely that it would be best to remove this controversial subject from its schools; there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools. And this Court has consistently held that it is not for us to invalidate a statute because of our views that the "motives" behind its passage were improper; it is simply too difficult to determine what those motives were.

Epperson, supra at 112-13 (Black, J., concurring) (citation omitted). Mr. Justice Black did not fault the majority opinion as departing from previous holdings that inquiry into legislative "motives" is not appropriate. Rather, he criticized the majority for its refusal to recognize his proffered possible secular purpose.

The Court's opinion in *Epperson*, therefore, when viewed in its entirety, cannot be said to dictate adoption of Mr. Justice Brennan's dicta. Rather, the Court's opinion stands for the proposition for which it was cited by the Court in *Nyquist*, "to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular purpose. . . ." *Nyquist*, 413 U.S. 756, 773 (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968)).[10]

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[10] The Supreme Court's analysis of the first prong of the establishment clause test in *Nyquist* is particularly instructive. Plaintiffs in *Nyquist* challenged certain amendments to New York's education and tax laws providing financial aid to nonpublic elementary and secondary schools. Plaintiffs asserted that the amendments, by providing funds to schools that taught religious doctrines, violated the establishment clause. The Court's analysis of the first prong of the establishment clause was complete upon the discovery

[footnote continued]

The second case cited by Mr. Justice Brennan to support his thesis was *McGowan v. Maryland,* 366 U.S. 420 (1961). Again, although parts of the Court's opinion permit an inference that it is necessary to determine the "true" purpose of a legislative enactment challenged under the establishment clause, examination of the entire opinion dispels any such inference.[11]

The appellants in *McGowan* were seven employees of a discount department store who had been convicted of violating Maryland's Sunday closing law. They appealed to the Supreme Court contending that the law under which they had been convicted was violative of the establishment clause.

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of possible secular purposes and no effort was made to discover the "true" purpose:

> **[W]e need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren. And we do not doubt—indeed, we fully recognize—the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.**

***Nyquist,* 413 U.S. at 773.**

[11] Mr. Justice Black was part of the majority that upheld Maryland's Sunday closing law in *McGowan.* Seven years later, when he wrote his concurrence to the Court's decision in *Epperson,* he apparently did not view *McGowan* as having been a departure from the Court's consistent holdings that inquiry into "motives" behind legislative enactments is not appropriate. *See* text, *supra* at 27–28.

The Court's opinion upholding appellants' convictions included an extensive historical discussion of Sunday closing laws in general. It concluded that although the purpose for early closing laws was to encourage religious participation, in more modern times numerous secular reasons have been advanced to support such laws. The Court acknowledged that legislation with a secular justification is not invalid because it coincidentally advances a religious doctrine:

> The "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. . . . The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

McGowan, supra at 442. Finally, the Court addressed the Maryland statute under attack. Initially the Court examined the face of the Maryland statute; next it examined that particular statute's predecessors; finally, the Court examined decisions of the Maryland courts for statements of purposes underlying the statute. The Court concluded:

> After engaging in the close scrutiny demanded of us when First Amendment liberties are at issue, we accept the State Supreme Court's determination that [illegible] statutes' present purpose and effect is not

> to aid religion but to set aside a day of rest and recreation.

McGowan, supra at 449.

When the Court's opinion is viewed as a whole, there are a number of indications that it was not intended to imply a necessity for the discovery of "true" legislative purpose. Rather, it seems more accurate to state the Court's holding as being that the "true" purpose of early closing statutes was religious; that there now exists numerous possible secular purposes; that the face of Maryland's statute does not reveal that the legislature acted solely for religious purposes; and finally that decisions of Maryland's courts did not reveal that the purpose of the statute was religious.[12] Accordingly,

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[12] It is unclear how state court decisions serve as a clue to the "true" legislative purpose. Further, in regard to the Court's inquiry into possible secular purposes, once at least one such possible secular purpose is discovered, such inquiry cannot be considered an inquiry into whether the "true" purpose was religious. The only part of the Court's analysis that could be termed an attempt to discover the "true" legislative purpose, therefore, was its examination of the face of the statute. It is interesting that to the extent any such evidence appeared on the face of the statute, it makes the "true" purpose, at the time of enactment, appear to have been religious:

> **The title of the major series of sections of the Maryland Code dealing with Sunday closing—Art. 27, §§ 492-534C—is "Sabbath Breaking"; § 492 proscribes work or bodily labor on the "Lord's day," and forbids persons to "profane the Lord's day" by gaming, fishing et cetera; § 522 refers to Sunday as the "Sabbath day." As has been mentioned above, many of the exempted Sunday activities in the various localities of the State may only be conducted during the afternoon and late evening; most Christian church services, of course, are held on Sunday morning and early Sunday evening. Finally, as previously noted, certain localities do not permit the allowed Sunday activities to be carried**

[footnote continued]

rather than supporting the thesis that it is necessary to discover the legislature's "true" purpose, *McGowan* indicates that if there are possible secular purposes to support a certain enactment and it does not clearly appear from an examination of the face of the enactment, and any relevant state court decisions, that the legislature's "true" motive was not to advance those secular purposes, the enactment is not violative of the establishment clause.

The case cited by Mr. Justice Brennan as lending indirect support for his thesis was *Grosjean v. American Press Co.*, 297 U.S. 233, 250-251 (1936). The Court's opinion in *Grosjean* also contains some language that, when viewed in isolation, appears to support his thesis. When viewed as a whole, however, as found by the Supreme Court in a subsequent decision, the Court's opinion in *Grosjean* does not support the need to discover the "true" legislative intent:

> [Defendant's] position, and to some extent that of the court below, rest upon a misunderstanding of *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it uncon-

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> on within one hundred yards of any church where religious services are being held. This is the totality of the evidence of religious purpose which may be gleaned from the face of the present statute and from its operative effect.

Finally, in light of the Court's conclusion that the statute's "present purpose and *effect* is not to aid religion, *McGowan*, *supra* at 449 (emphasis added), perhaps it would be more accurate to characterize most of the Court's analysis as an examination of the statute's "primary effect" rather than the legislative purpose. *See Nyquist*, 413 U.S. at 773.

> stitutional. Thus, in *Grosjean* the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on its face did nothing other than impose just such a tax. Similarly, in *Gomillion*, the Court sustained a complaint which, if true, established that the "inevitable effect," 364 U.S., at 341, of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no reason other than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because the inevitable effect—the "necessary scope and operation," *McCray v. United States*, 195 U.S. 27, 59 (1904)—abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

United States v. O'Brian, 391 U.S. 367, 384 (1968).

As stated previously, in addition to not being supported by the cases cited, Mr. Justice Brennan's thesis is not supported by reason. "[I]t is simply too difficult to determine what [the "true" legislative] motives were." *Epperson*, 393 U.S. at 113 (Black, J., concurring). Some of the difficulties with such an inquiry were acknowledged in the Court's opinion in *O'Brian*:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different

> matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

391 U.S. at 383-84 (footnote omitted).[13]

Based on the foregoing, the Court concludes that the relevant inquiry on the first prong of the establishment of religion test is whether there is a possible secular purpose to support Ordinance Number 160-1978. Clearly, there are numerous such possible purposes, including the state's valid interests in maternal health and the potentiality of human life. *Roe,* 410 U.S. at 148-150. Accordingly, those parts of Ordinance Number 160-1978 under consideration do not fail the first prong of the establishment clause test.[14]

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[13] Mr. Justice Brennan was among the justices constituting the majority in *O'Brien.*

[14] The Court feels constrained to note two things at this point. Although the existence of possible secular purposes to support the ordinance permits it to survive the first prong of the establishment clause test, to the extent that the ordinance's effect is an infringement upon a fundamental rights, it must further a compelling state interest. *See Roe,* 410 U.S. 113. Further, the Court expresses no view concerning the constitutionality of an enactment that includes on its face a statement that its only purpose is to further a religious belief. *See McGowan,* 366 U.S. at 432-33.

2.

The second prong of the establishment clause test is whether the challenged legislation has a "primary effect" of advancing or inhibiting religion. Plaintiffs have presented little argument on this prong of the establishment test. In substance, they have argued that Ordinance Number 160-1978 will have an effect of discouraging some women from choosing to have an abortion; some religious groups do not believe that abortions are appropriate; therefore, the ordinance has a primary effect of furthering a religious doctrine.

The Court cannot agree with plaintiffs' arguments. Rather than demonstrating that the ordinance has a "primary" effect of furthering religion they have shown only an indirect effect in that regard. Rather, the primary effect is to impose regulations upon the performance of a medical procedure. To the extent that certain sections of the ordinance interfere with a woman's privacy right to decide to terminate her pregnancy without furthering a compelling state interest, that particular section will be found violative of the due process clause of the Fourteenth Amendment. Whatever incidental effect that such section would also have on that woman's religious beliefs, however, it could not be termed a "primary effect" of advancing or inhibiting religion.

3.

The third prong of the establishment clause test is whether the challenged enactment results in excessive government entanglement with religion. That is, whether the ordinance results in a relationship between the church and state that calls for "official and continuing surveillance leading to an impermissible degree of entanglement." *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970). The Court does not see how the third prong of the establishment clause test has any application to Ordinance Number 160-1978.[15]

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[15] Plaintiffs appear to rely on two things to contend that the ordinance under discussion results in excessive entanglement. First, they rely upon the Court's discussion of "political division along religious lines" in *Lemon v. Kurtzman*, 403 U.S. 602, 622-623 (1971). Examination of that opinion, however, reveals that the Court was warning of division resulting from continued regulation of churches, a situation not present in this case:

> Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified. The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.

Lemon, supra at 623. Secondly, they rely on a passage from Mr. Justice Harlan's concurring opinion in *Walz v. Tax Commissioner*, 397 U.S. 664, 695 (1970):

> [G]overnment involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion. Thus, as the opinion of the Chief Justice notes, religious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against.

Examination of the quoted passage in context reveals that Mr. Justice Harlan was acknowledging that debate respecting birth control and abortion is an example of political involvement by religious groups that is acceptable. What is violative of the third prong of the establishment clause test is not legislative enactments that to a certain extent result from political involvement of religious groups, but rather legislative enactments that will result in continuing involvement of the state in regulating church affairs:

[footnote continued]

B.

Plaintiffs characterize their other claim that is addressed to all the sections of the ordinance that they have standing to challenge as being based on the equal protection clause of the Fourteenth Amendment. Their claim is that such sections are unconstitutional because Akron does not similarly regulate other comparable medical procedures:

> This singling out of abortion "treats differently without a compelling reason medical procedures which in terms of health risk are not distinguishable". *Friendship Medical Center v. Chicago Board of Health,* 505 F.2d 1141, 1153, (7th Cir. 1974). For this reason Chapter 1870 *as a whole* violates the Equal Protection Clause of the Fourteenth Amendment and should be declared unconstitutional. Such action was taken in *Friendship Medical Center v. Chicago Board of Health, supra*; *Word v. Poelker,* 495 F.2d 1349 (8 Cir. 1974); and *Mahoning Women's Center v. Hunter,* 444 F. Supp. 12, 17 (N.D. Ohio 1977).

Plaintiffs' post-trial brief at 69 (emphasis in original). Although there is language in the opinions of the Supreme Court and of lower courts that seems to imply that regulating abortion differently than other medical procedures results in an equal protection problem, *see, e.g. Bellotti v. Baird (Bellotti I),* 428 U.S. 132, 148-50 (1976); *Mahoning Women's Center v. Hunter,* 444

> Of course, as the Court noted in *Walz*, "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." *Walz v. Tax Commission, supra,* at 670. We could not expect otherwise, for religious values pervade the fabric of our national life.

Lemon, supra at 623.

F. Supp. 12, 17 (N.D. Ohio 1977), this Court is convinced that such different treatment of medical procedures does not implicate the equal protection clause.[16]

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[16] Much of the confusion concerning whether different treatment of comparable medical procedures implicates the equal protection clause can be traced to the following language:

> In Georgia, there is no restriction on the performance of nonabortion surgery in a hospital not yet accredited by the JCAH so long as other requirements imposed by the State, such as licensing of the hospital and of the operating surgeon, are met. . . .
>
> We hold that the JCAH-accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not "based on differences that are reasonably related to the purposes of the Act in which it is found."

Doe v. Bolton, 410 U.S. 179, 193-94 (1973) (quoting *Morey v. Doud*, 354 U.S. 457, 465 (1957)). Superficially, this appears to be equal protection analysis mandated by different classifications of medical procedures. This misconception is encouraged by the fact that *Morey* clearly presented an equal protection question. Close examination of the following language, however, reveals that the analysis applied was due process, not equal protection, analysis:

> Some courts have held that a JCAH-accreditation requirement is an *overbroad infringement of fundamental rights because it does not relate to the particular medical problems and dangers of the abortion operation. . . .*

Doe, supra at 194 (emphasis added). The purpose of looking at what Georgia required in comparable situations was to gain insight into whether there was a valid state interest for the particular regulation thereby permitting it to stand under the due process clause. If it was not required for other similar procedures and further was not something that was required by a unique aspect of the abortion procedure, it would be strong evidence of the absence of a valid state interest.

There are numerous "clues" in the Supreme Court's abortion decisions that what superficially appears to be an equal protection analysis is, in fact, something else. One of these "clues" is as follows:

[footnote continued]

The equal protection clause is implicated by legislative enactments that burden people within a particular group while not burdening people not in that group.[17] Generally, there must be a rational basis to support the legislative classification. Certain classifications, however, are considered "suspect" and, as a result, are subject to a "compelling state interest test" (i.e., race). To the extent that it is possible to view the sections challenged in this action as "classification" enactments, no suspect classification of people is involved and it is only necessary to apply a "rational basis test."[18]

The analysis of plaintiffs' equal protection claim, however, cannot stop here. The Supreme Court has appeared, at times, to apply a strict scrutiny test under the equal protection clause to statutes that do not involve suspect classifications:

> We must decide, first, whether the [challenged enactment] operated to the disadvantage of some suspect class *or impinges upon a fundamental right*

> We could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional. As a consequence, we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions.

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976) (footnote omitted).

[17] Or, in the alternative, benefits people not in a particular group while not benefiting people within the group.

[18] The relevant classification would have to be either women desiring abortions versus women desiring other comparable medical procedures or doctors performing abortions versus doctors performing other comparable medical procedures. Neither presents a "suspect" classification.

> *explicitly or implicitly protected by the Constitution,* thereby requiring strict judicial scrutiny. . . . If not, the [enactment] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973) (emphasis added). It is incorrect, however, to consider this "second-branch" as truly being a part of equal protection analysis. *But see, e.g., Maher v. Roe,* 432 U.S. 464, 470-74 (1977).[19] The so-called second branch of the equal protection clause analysis is, in reality, not founded upon the equal protection clause, but rather, is simply the test applied to any law that allegedly, "impinges upon a substantive right or liberty created or conferred by the Constitution. . . ." *San Antonio School District, supra* at 61 (Stewart, J., concurring).[20] Therefore, there is no need to separately

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[19] In *Maher* the Court considered the constitutionality of Connecticut's decision to not provide medicaid benefits for first term abortions but to continue to provide such benefits for births. The Court initially determined that indigent women desiring abortions was not a suspect class. Only a rational basis test was necessary under the "first branch of the equal protection test." The Court next determined that the state's refusal to fund abortions placed "no obstacles—absolute or otherwise—in the woman's path" to exercise her freedom to decide whether to terminate her pregnancy. *Maher, supra* at 474.

[20] Mr. Justice Stewart's analysis was as follows:

> Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.

[footnote continued]

apply "second branch" of the equal protection clause test. Any section of the ordinance that would fail under this test will do so under the Court's due process

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> There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious. . . .
>
> This doctrine is no more than a specific application of one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law. . . .
>
> Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently "suspect." Because of the historic purpose of the Fourteenth Amendment, the prime example of such a "suspect" classification is one that is based upon race. . . . But there are other classifications that, at least in some settings, are also "suspect"—for example, those based upon national origin, alienage, indigency, or illegitimacy.
>
> Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. *For example, a law that provided that newspapers could be published only by people who had resided in the State for five years could be superficially viewed as invidiously discriminating against an identifiable class in violation of the Equal Protection Clause. But, more basically, such a law would be invalid simply because it abridged the freedom of the press.* Numerous cases in this Court illustrate this principle.

San Antonio School District, supra at 59-61 (footnotes and citations omitted) (emphasis added). *See Shapiro v. Thompson,* 394 U.S. 618, 658, 663 (Harlan, J. dissenting).

analysis.[21] Further, there is no reason to consider whether sections of the ordinance not impinging upon constitutional rights could withstand the equal protection clause's rational basis test because any sections that could not do so will also fail under the Court's due process analysis.

V.

As noted previously, as well as asserting that sections of Ordinance Number 160-1978 infringe their patients' constitutional rights, plaintiffs claim that certain sections violate rights allegedly guaranteed them (plaintiffs) by the Constitution. Among the rights assertedly guaranteed plaintiffs by the Constitution and violated by parts of Ordinance Number 160-1978 are: (1) "[t]he right of a physician to practice medicine in accordance with his or her best medical judgment;" (2) "[t]he right of a physician to give . . . medical treatment and advice, in accordance with accepted medical standards, pertaining to the decision whether to terminate a pregnancy;" and (3) "[t]he rights of the plaintiff clinics to provide . . . counseling, education and other services relevant to the making and effectuation of the abortion decision." Fourth Amended Complaint.

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[21] The inappropriateness of considering the "second branch" as a part of equal protection analysis becomes clear when viewed in light of a proposal that plaintiffs have asserted was under consideration by Akron's City Council. Plaintiffs alleged that City Council considered imposing reporting and inspection regulations on all facilities in Akron that performed medical procedures comparable to abortions. According to plaintiffs, the proposal was abandoned because of the expense involved in enforcing it. If such regulations had been imposed, that is, if Akron regulated tooth extractions in the same manner it regulated abortions, the abortion regulations would survive plaintiffs' so-called equal protection analysis. If, however, the abortion regulations infringed upon the constitutional right of privacy and were not supported by a compelling state interest, they would be invalid under due process analysis. Treating enactments under the so-called "second branch" of the equal protection test serves to add confusion and has no corresponding benefit.

Initially, there is clearly no recognized constitutional right that guarantees a physician freedom to practice medicine free of state regulation. Further, there is no greater need for such freedom for a doctor than for a member of any vocation.

In regard to plaintiffs' second and third asserted constitutional rights, assisting an individual woman to exercise a right guaranteed her by the Constitutional cannot be viewed as affording plaintiffs any independent constitutional rights. The Supreme Court considered such a claim in *Whalen v. Roe,* 429 U.S. 589, 604 n.33 (1977):

> The doctors rely on two references to a physician's right to administer medical care in the opinion in *Doe v. Bolton,* 410 U.S. at 197-198, and 199, 93 S. Ct., at 750, and 751, 35 L. Ed. 2d 201. Nothing in that case suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care. The constitutional right vindicated in *Doe* was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on

> the patient, they would not have violated the Constitution.

To the extent plaintiffs rely on asserted constitutional rights to practice medicine in general or to assist women in obtaining abortions, therefore, their challenge to the sections under discussion must fail.

VI.

Plaintiffs' primary claim regarding the various sections of Ordinance Number 160-1978 is that they violate, "[t]he right of [plaintiffs'] patients to make and effectuate the decision to terminate their pregnancy. . . ." Fourth Amended Complaint. Initially, the Court will discuss this right and its implications for regulations imposed upon individuals providing abortion related services in general. The Court will then address the specific sections of Ordinance Number 160-1978 in order to determine whether they are violative of this or any other right guaranteed by the Constitution.

A.

In *Roe v. Wade,* 410 U.S. 113, 153 (1973), the Supreme Court held that the Fourteenth Amendment's protection of certain aspects of personal privacy included a guarantee .that a woman could decide whether to terminate her pregnancy without unjustified state interference. The Court further recognized, however, that the privacy right was "not unqualified and must be considered against important state interest in regulation." Inasmuch as the woman's right to make an unencumbered decision concerning abortion was found in the "fundamental right" of privacy, the Court stated that interference with that right could be justified only by a "compelling state interest." *Roe, supra* at 155. The

Court further recognized that the state had a valid interest in maternal health and the protection of potential human life. Those interests become compelling at different times during the course of pregnancy and, as a result, permit the state to impose certain regulations after the close of the first trimester. *Roe, supra* at 162-64. The issues presently before this Court, however, concern only the application of regulations during the first trimester because that is the extent of plaintiffs' standing. The Court in *Roe* held that during the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Roe, supra* at 164.

A number of lower courts following *Roe* interpreted it as forbidding all regulation of first term abortion providers. *E.g., Friendship Medical Center v. Chicago Bd. of Health,* 505 F.2d 1141, 1148-52 (1974), *cert. denied,* 420 U.S. 997 (1975). In *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), however, the Supreme Court upheld a regulation requiring a patient's written informed consent to a first trimester abortion and a second regulation placing certain recordkeeping requirements upon first trimester abortion providers. While acknowledging that *Roe* establishes that the state "may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy," the Court held, in regard to the informed consent requirement:

> The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, consti-

> tutionally, by the State to the extent of requiring her prior written consent.
>
> We could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional. As a consequence, we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions.

Danforth, supra at 67. It was not clear from the above quoted language whether the Court was finding a compelling state interest in insuring informed consent or applying a lesser standard. It is quite clear, however, that it applied a lesser standard in considering the regulation imposing recordkeeping requirements:

> As to the first stage, one may argue forcefully, as the appellants do, that the State should not be able to impose any recordkeeping requirements that significantly differ from those imposed with respect to other, and comparable, medical or surgical procedures. We conclude, however, that the provisions of §§ 10 and 11, while perhaps approaching permissible limits, are not constitutionally offensive in themselves. Recordkeeping of this kind, if not abused or overdone, *can be useful* to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment.

Danforth, supra, at 80-81 (emphasis added). In *Bellotti I,* 428 U.S. at 147, the Court explained its decision in *Danforth* not to strike the informed consent requirement as follows.

> In *Planned Parenthood of Central Missouri v. Danforth,* we today struck down a statute that

> created a parental veto. . . . At the same time, however, we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it *unduly burdens the right to seek an abortion.*

(Emphasis added.)

Subsequently, the Court expanded upon its explanation of the decision in *Danforth*:

> [I]n *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 70-71, n.11 (1976), we held that Missouri's requirement of spousal consent was unconstitutional because it "granted [the husband] the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy." Missouri had interposed an "*absolute obstacle* to a woman's decision that *Roe* held to be constitutionally protected from such interference." (Emphasis added.) Although a state-created obstacle need not be absolute to be impermissible, see *Doe v. Bolton,* 410 U.S. 179 (1973), *Carey v. Population Services International,* 431 U.S. 678 (1977), we have held that a requirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." *Bellotti v. Baird,* 428 U.S. 132, 147 (1976). We recognized in *Bellotti* that "not all distinction between abortion and other procedures is forbidden" and that "[t]he constitutionality of such distinction will depend upon its degree and the justification for it." *Id.,* at 149-150.

Maher v. Roe, 432 U.S. 464, 473 (1977).

It becomes clear, therefore, from an examination of the cases decided since *Roe,* that not all regulation of first trimester abortion providers is impermissible. An absolute prohibition of first trimester abortions could only be justified by a compelling state interest. Likewise, regulations that afford the power to veto a woman's decision to terminate her pregnancy must be supported by a compelling state interest. *See Danforth,* 428 U.S. at 67-72. Regulations that interfere with a woman's privacy to a lesser degree, however, require a lesser showing by the state to withstand constitutional attack: "As *Whalen* [*v. Roe,* 429 U.S. 589 (1977)] makes clear, the right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it." *Maher, supra* at 473.

Accordingly, the Court must determine the degree that each section of Ordinance Number 160-1978 interferes with a woman's constitutional right, in consultation with her physician, to choose to terminate her pregnancy. That interference must then be weighed against any valid state interest furthered by such section. Finally, it will be necessary to consider the combined effect of all the various sections not independently unconstitutional to determine whether their combined impact results in such a degree of interference with the constitutional right at issue to result in a finding of invalidity.[22]

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[22] Every regulation imposed upon first trimester abortions is going to have some impact upon a woman's right to decide to terminate her pregnancy. That is, any regulation that makes "the physician's work more laborious or less independent," *Whalen v. Roe,* 429 U.S. 589, 605 n.33 (1977), is, at least, going to make it more expensive for a woman to effectuate her abortion decision. If the combined weight of a number of regulations, not independently unconstitutional, were to serve to make it unduly burdensome for a woman to carry out her decision, those sections would be invalid.

B.

1.

The first section of Ordinance Number 160-1978 that plaintiffs have standing to challenge is Section 1870.05, "Notice and Consent." The Court will consider the two subsections of this section in reverse order.

a.

Subsection (B) imposes a parental consent requirement prior to the performance of an abortion on a minor under the age of fifteen:

> (B) No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, and
>
> (1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or
>
> (2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

In *Planned Parenthood of Central Missouri v. Danforth, supra* at 72-75, the Supreme Court found a blanket parental consent requirement for all unmarried minors under the age of eighteen invalid. The Court specifically noted, however, that its holding should not be read as a suggestion that all minors have the capability of giving effective consent to the performance of an abortion. The problem with the section there under consideration was that it applied to all minors:

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the *competent* minor mature enough to have become pregnant.

Danforth, supra at 75 (emphasis added).

The fact that the key to a parental consent requirement to the performance of an abortion is the pregnant minor's ability to give valid informed consent is clear from the recent decision in *Bellotti v. Baird (Bellotti II),* 99 S. Ct. 3035 (1979). The plurality and the four justices concurring in the judgment agreed that a state cannot require a pregnant minor to obtain the consent of her parents to a first trimester abortion unless it establishes an alternative procedure by which she can attempt to demonstrate that she is capable of giving informed consent to the desired abortion "independently of her parents' wishes." *Bellotti II, supra* at 3048 (plurality opinion); *see id.* at 3053-55 (Stephens, J., concurring in judgment). It is not permissible for a state to require parental consent for a first trimester abortion, therefore, except in those cases of minors unable to demonstrate that they are capable of themselves giving informed consent.[23]

Subsection (B) of Section 1870.05 does not comport with the rule established by *Danforth* and *Bellotti II.* It does not establish a procedure by which a minor can avoid a parental veto of her abortion decision by demonstrating that her decision is, in fact, informed. Rather, it requires, in all cases, both the minor's informed consent and either parental consent or a court order.[24] Subsection (B) places an impermissible right to veto the informed decision of a competent minor in her parents or, alternatively, in a court. It is, therefore, invalid.

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[23] The justices constituting the plurality in *Bellotti II* felt that even in the case of minors incapable of giving informed consent it was necessary for the state to afford a procedure by which it could be determined whether an abortion "would be in her best interests." *Bellotti II, supra* at 3048 (plurality opinion). This statement, however, was not necessary for decision of the question before the Court in *Bellotti II* nor any question presently before this Court.

b.

Subsection (A) of Section 1870.05 provides a parental notice requirement prior to performance of an abortion on any minor below the age of eighteen:

> (A) No physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of the parents or guardian, computed from the time of mailing unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman.

A parental notice requirement is not as much of an intrusion upon a minor's right of privacy as a requirement of parental consent. It is, however, a substantial intrusion, particularly for those minors mature and informed enough to grant valid consent to an abortion without parental consultation. Such consultation requirement furthers the state's interest in insuring that parents be given an opportunity to participate in an important and potentially traumatic decision in the life of their minor daughter. But, those minors mature enough to make the decision to have an abortion independent of their parents' wishes must be afforded an opportunity to convince a court, or other body, that consultation would not be in their own, or in their parents', best interest. This Court recognizes that for the vast majority of minors parental consultation concerning such an important and irreversible decision is not only desirable, but essential. It also recognizes, however, that the vast majority of cases is not all cases. The problem with Subsection (A) of Section 1870.05 is that it, in effect, requires parental notice in all cases. (As conceded by defendant-intervenors, Chapter 2151 of the Ohio Revised Code, "provides for notice in all instances *once* [a] *complaint has been filed* . . ." with a juvenile court in Ohio. Defendant-Intervenors' Reply To Plaintiffs' Supplementary Brief Concerning *Bellotti v. Baird* (emphasis in original). The apparent alternative provided by subsection (A) to parental notice, therefore, is not an actual alternative.) Accordingly, the Court finds subsection (A) of Section 1870.05 invalid.

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[24] The Court's reading of subsection (B) of Section 1870.05 is supported by the provision in subsection (B) of Section 1870.06: "In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, *and* one of her parents or legal guardian whose consent is required in accordance with Section 1870.05 (B) of this Chapter . . . ." (Emphasis added.)

The Court feels constrained to emphasize the narrowness of its decision. It is holding only that parental notice cannot be required for minors who are capable of granting informed consent without parental consultation and are able to convince a court or other body that notice would not be in their, or in their parents', best interest. *But see Bellotti II, supra* at 4974-75 (plurality opinion).

2.

Plaintiffs next have standing to challenge Section 1870.06. The Court will consider the subsections of said section in seriatim.

a.

Subsection (A) of Section 1870.06 provides that an abortion cannot be performed without the informed written consent of the pregnant woman, "and one of her parents or her legal guardian ,whose consent is required in accordance with Section 1870.05(B) of this Chapter. . . ." Inasmuch as the Court has declared Section 1870.05 unconstitutional, the reference to it is a nullity and will be disregarded.

The Supreme Court upheld a requirement of written informed consent to a first trimester abortion in *Danforth, supra* at 65-67. The Court's reasoning in that case applies to the present issue. Accordingly, the Court finds no constitutional defect in subsection (A) of Section 1870.06.

b.

Subsection (B) of Section 1870.06 provides that, "[i]n order to insure that the consent for an abortion is truly informed consent . . .," the attending physician must inform every abortion patient of a number of specific things.[25] Those things range from a statement that the patient is pregnant to a detailed description of the "anatomical and physiological characteristics of the particular unborn child. . . ." Also included is a statement that "the unborn child is a human life from the moment of conception. . . ."

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[25] Again, inasmuch as Section 1870.05(B) has been declared unconstitutional, the reference to it will be disregarded.

In addition to challenging this subsection as an unjustified interference with the patient's right to privacy, the physician plaintiff asserts that the statement concerning human life is an interference with his free exercise of religion. Inasmuch as the Court has concluded that the subsection is unconstitutional as violative of a woman's right to privacy, it will not be necessary to consider the physician plaintiff's free exercise claim.

The Court in *Danforth, supra* at 67 n.8, after approving a requirement of informed written consent to the performance of an abortion, included the following footnote:

> The appellants' vagueness argument centers on the word "informed." One might well wonder, offhand, just what "informed consent" of a patient is. The three Missouri federal judges who composed the three-judge district court, however, were not concerned, and we are content to accept, as the meaning, the giving of information to the patient as to just what would be done and to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

The stated desire to insure that a woman's consent to an abortion is truly informed is, of course, a valid state interest. Subsection (B), however, goes far beyond what is permissible in pursuance of that interest.

Initially, the defendants were unable to prove that some of the matters required to be told a patient as facts by subsection (B) were true. For example, there was much evidence that rather than being a "major surgical procedure" as the physician is required to state by part (5) of subsection (B), an abortion generally is considered a "minor surgical procedure." Further, there was much evidence that it is impossible to determine many of the items the physician is required to inform the patient by part (3) of subsection (B), such as the "unborn child's" sensitivity to pain.[26]

The Court has no doubt that the state could constitutionally require that all abortion patients be counselled, either by their attending physician or another individual having specified minimum qualifications.[27] The state cannot, however, go beyond that to specify what each patient must be told. That determination must be left to the individual counselor based upon the needs of the particular patient. Otherwise, the physician is being placed in the "undesired and uncomfortable straitjacket" warned against by the Supreme Court. This is not impermissible because of any perceived interference with rights of the physician. Rather, it is impermissible because it interferes with the woman's right to consult a physician who is free from such state interference.

Accordingly, the Court finds subsection (B) of Section 1870.06 unconstitutional.

C.

Subsection (C) of Section 1870.06 provides that the attending physician must inform each of his patients "of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term."[28]

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[26] There is also a vagueness problem with part (3) of subsection (B) because of the use of the phrase "including, but not limited to . . . ." It is impossible for the physician to determine exactly what is required.

[27] *See* text *infra* at 57.

Initially, the fact that the state can require this type of information to be provided abortion patients is clear from the Supreme Court's approval of an informed consent requirement in *Danforth, supra* at 65-67 n.8. Subsection (C)'s requirement that this information be imparted by the attending physician rather than by a counselor, as is presently done at the clinics operated by the corporate plaintiffs, however, makes effectuation of the abortion decision more expensive. That impact is not so great as to require a compelling state interest to support the requirement that the "counseling" be done by the physician rather than by another individual. Akron's City Council could well have rationally concluded that because of the special relationship between a patient and her physician, such "counseling" should be done by the physician. In so doing, it would be furthering a valid state interest in the health of its female citizens. Subsection (C) of Section 1870.06, therefore, is not unconstitutional.

d.

Subsection (D) of Section 1870.06 provides that the attending physician must provide his patient with a duplicate of the signed informed consent form. This requirement has no perceivable impact upon the woman's abortion decision and is not unconstitutional.

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[28] References to sections previously found unconstitutional are nullities and, therefore, disregarded.

3.

Section 1870.07 imposes a twenty-four hour waiting period between the time a woman signs an informed consent form as requied by Section 1870.06 and the performance of an abortion. The Court of Appeals for the Sixth Circuit refused to strike a similar waiting period requirement in *Wolfe v. Schroering,* 541 F.2d 523, 526 (6th Cir. 1976). The plaintiffs in that case, however, did not "claim that the 24 hour waiting period significantly burdens the abortion process." The plaintiffs in the present case do make such a claim and have submitted evidence in support of that claim.

The twenty-four hour waiting period serves to make effectuation of the abortion decision more expensive in two ways. First it requires the patient to make two trips to the clinic instead of one. Secondly, when considered along with the requirement of subsection (C) of Section 1870.06 that the physician do the counseling required, it makes the cost of the procedure itself more expensive.[29] This increase in expense, however, is not such that the waiting period requirement must withstand a compelling state interest test.[30]

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[29] This increased expense can be minimized by arranging the days upon which procedures are performed to permit the physician to counsel women scheduled to have an abortion a day or so later on the same day as he performs abortions upon previously counseled women.

[30] The Court does not accept plaintiffs' assertions that the waiting period may result in the passing from the first to the

[footnote continued]

The state interest furthered by the waiting period requirement is the insurance that a woman's abortion decision is made after careful consideration of all the facts applicable to her particular situation. This is an important state interest considering the irreversible nature and possible lasting consequences of the abortion decision.

The plaintiffs have argued, however, that the state's concern in this area is satisfied by the fact that most women undergo counseling at a social agency prior to visiting an abortion clinic. Such agency, however, will not be able to counsel the woman with an eye to the particular medical facts concerning her individual pregnancy as will her attending physician. In addition, the fact that many or even most women undergo counseling prior to visiting an abortion clinic does not detract from the valid state interest in seeing that all women undergo counseling.

Having considered the impact of the twenty-four hour waiting period on a woman's abortion decision and the state's interest in such a waiting period, the Court finds Section 1870.07 constitutional.

4.

Section 1870.08 imposes certain recordkeeping requirements upon facilities in which abortions are per-

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second trimester. "Given the imprecision of the trimesters . . . a delay of 24 hours could not result in a transition from the first into second trimester. . . ." ***Wolfe v. Schroering, supra*** **at 526. In addition, there was evidence that at least one of the clinics the day on which a particular woman's abortion is performed is, to an extent, determined by whether she desires a general as opposed to a local anaesthetic. If such delay does not result in a woman passing into the second trimester, it does not appear that a mandatory twenty-four hour waiting period will have that result.**

formed. The impact of such requirement upon the woman's decision to terminate her pregnancy is minimal and it serves to further the state's valid interest in the health of the patient. Section 1870.08, therefore, is constitutional.

5.

Section 1870.09 provides that the medical records and physical facilities of all clinics and hospitals in which abortions are performed must be open for inspection by Akron's Department of Public Health and that such department must inspect all such locations at least once every six months. It also provides that all medical records shall remain confidential.

Plaintiffs do not attack this section as violative of any rights of their patients. Rather, the corporate plaintiffs contend that by authorizing warrantless searches of their clinics, Section 1870.09 is violative of their rights guaranteed by the Fourth Amendment.

Defendants' position is that the warrantless search authorized by this section is not unreasonable because any such search would be limited in scope and because plaintiffs are engaged in a "pervasively regulated business," *United States v. Biswell,* 406 U.S. 311, 316 (1972), or "closely regulated" industry "long subject to close supervision and inspection." *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 74, 77 (1970). *See Marshall v. Barlow's, Inc.,* 436 U.S. 307, 313 (1978).

The Court cannot agree. Initially, health care facilities do not have "a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Barlow's, supra* at 313. Further, although defendants assert that any inspections of plaintiffs' clinics would be limited to an inspection of records and documents except for a sufficient inspection of facilities to insure satisfaction of Sections 1870.15 and 1870.16 of Ordinance Number 160-1978, such limitations do not appear on the face of Section 1870.09.

Accordingly, the Court finds that this section purports to authorize broad warrantless searches of plaintiffs' clinics. Such searches would be violative of plaintiffs' rights guaranteed by the Fourth Amendment. Section 1870.09, therefore, is unconstitutional.

6.

Section 1870.10 requires the attending physician to complete an individual abortion report for each woman upon whom he performs an abortion and an individual complication report for any post-abortion care provided. These reports are confidential and are to be completed on forms supplied by Akron's Department of Health.

The Supreme Court approved simlar reporting requirements in *Danforth, supra* at 79-81. The Court cautioned, however, that "[r]ecordkeeping of this kind, *if not abused or overdone,* can be useful to the state's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." *Danforth, supra* at 81 (emphasis added). Plaintiffs contend that Section 1870.10 is unnecessary and redundant of requirements imposed upon them by the State of Ohio.

The fact that Ohio already requires plaintiffs to provide much of the same information required by Section 1870.10, however, makes this section's requirements less burdensome. Of course, if the information supplied to Ohio by plaintiffs was readily available to Akron, there would be no reason for this section and even though the impact upon an individual woman's abortion decision is slight, it would fail. There was, however, evidence that Akron has had difficulty obtaining the desired information from Ohio in a form that would enable them to make desired determinations concerning abortions performed in Akron. On balance, the Court finds Section 1870.10 constitutional.

7.

Section 1870.16 provides:

> Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner.

Plaintiffs do not challenge this section as violative of the rights of their patients. Rather, the physician plaintiff challenges it as being so vague as to constitute a violation of his right to due process.

The Supreme Court considered a similar "vagueness" claim in *United States v. Harriss,* 347 U.S. 612, 617 (1954):

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

The physician plaintiff contends that, because of its use of the term "humane," Section 1870.16 does not afford him "fair warning" of the standard to which his conduct must conform.

There is the possibility of some uncertainty regarding the intended meaning of most English words and phrases.

Robinson v. United States, 324 U.S. 282, 286 (1945). Certain words, however, are of such a nature that they can evoke a totally different understanding in each individual listener. Among those words is the term "humane."

Humane means "marked by compassion, sympathy, or consideration for other human beings or animals." Webster's Third New International Dictionary 1100 (1965). An individual's sense of "compassion," "sympathy" and "consideration" is a product, to a large extent, of his moral and religious training. As a result, a practice considered humane by one individual may well be considered inhumane by another.

The present section could, depending upon the sensitivities of the listener, be interpreted as meaning any number of things including the imposition of the "expensive burial" feared by plaintiffs in *Planned Parenthood Ass. v. Fitzpatrick,* 401 F. Supp. 554 (E.D. Pa. 1975). The appropriate method for Akron's city council to have followed to insure that aborted fetuses are disposed of in a manner that they considered "humane," would have been to specifically state what methods of disposal were not or, alternatively, were acceptable. Accordingly, the Court finds Section 1870.16 void for vagueness.

8.

Section 1870.17 provides:

> Any physician who shall perform or induce an abortion, shall, subsequent to that abortion being performed or induced, provide his patient with specific oral and written medical instructions to be followed by that patient in order to insure her safe recovery from the abortion.

This section has no significant impact upon a woman's right to effectuate her abortion decision and furthers the valid state interest in maternal health. Accordingly, Section 1870.17 is constitutional.

9.

Having determined that Sections 1870.06(A); 1870.06(B); 1870.06(D); 1870.07; 1870.08; 1870.10; and 1870.17 are not unconstitutional when considered individually, the Court still must consider whether the combined impact of such sections upon a woman's privacy right to make and effectuate a decision to terminate her pregnancy free from state interference is such that they are invalid. There is no doubt that these regulations are going to have some impact upon a woman's abortion decision because they are going to make the effectuation of that decision more expensive. They will not make the cost of an abortion so much more expensive, however, that it will serve as a veto of plaintiffs' patients' abortion decision. These regulations do not, therefore, have to withstand a compelling state interest test. Further, the Court finds that the sections further valid state interests in maternal health and welfare and that the furtherance of those interests outweigh their effect on a woman's abortion decision.

Accordingly, the Court finds that Sections 1870.06(A); 1870.06(B); 1870.06(D); 1870.07; 1870.08; 1870.10; and 1870.17, when considered together, are not unconstitutional.

VII.

As noted previously, the Court's initial determination regarding severability must now be reviewed to determine whether the legislative body that adopted Ordinance

Number 160-1978 would wish those parts of the ordinance not declared unconstitutional to remain without those parts found unconstitutional.[31]

As also noted, Section 1870.19 is evidence of a desire for severability, but it is not in itself determinative. Rather, it is necessary to look at the specific invalid sections and attempt to determine what the legislative body would desire.

The Court has found Section 1870.05's notice and consent provisions unconstitutional. There are a number of references to Section 1870.05(B) in other sections of the ordinance. All of those references are phrased in such a manner that subsection (B)'s invalidity does not interfere with the primary purpose of the sections containing them. The Court concludes, therefore, that Section 1870.05's invalidity does not affect other sections of the ordinance.

The Court also found Section 1870.06(B) invalid. Although other sections, such as subsection (A) of Section 1870.06, are affected by that finding, the Court believes that the City Council would still desire the other sections to remain in the absence of Section 1870.06(B)'s very specific requirements. The Court concludes, therefore, that Section 1870.06(B)'s invalidity does not affect other sections of the ordinance.

The next section found unconstitutional was Section 1870.09. Inasmuch as the city can still carry out the purposes of that section by way of an inspection pursuant to a warrant, the Court concludes that its invalidity does not affect the rest of the ordinance.

The final part of Ordinance Number 160-1978 found unconstitutional was Section 1870.16. This section does not appear to be substantially related to the rest of the ordinance. Accordingly, the Court concludes that its invalidity does not affect other parts of the ordinance.

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[31] *See* note 6 *supra.*

VIII.

Based upon the foregoing, the Court concludes that plaintiffs lack standing to challenge Sections 1870.02; 1870.03; 1870.04, 1870.11; 1870.12; 1870.13; 1870.14; and 1870.15 of Ordinance Number 160-1978. The Court further concludes that Sections 1870.05; 1870.06 (B); 1870.09; and 1870.16 of Ordinance Number 160-1978 are unconstitutional and enforcement of those provisions shall be permanently enjoined. Finally, the Court concludes that the remaining sections of Ordinance Number 160-1978 are constitutional.[32]

Accordingly, the preliminary injunction previously entered in this action is hereby dissolved. Further, defendants are hereby permanently enjoined from enforcing Sections 1870.05; 1870.06(B); 1870.09; and 1870.16 of Ordinance Number 160-1978.

IT IS SO ORDERED.

/s/ Leroy J. Contie, Jr.
U.S. District Judge

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[32] Of course, any references to sections of the ordinance found unconstitutional contained in sections not found unconstitutional are a nullity and must be disregarded.

APPENDIX F

DISTRICT COURT ORDER
on
Motion for New Trial, October 4, 1979

ORDER

The above captioned matter is before the Court upon plaintiffs' "Motion For A New Trial Or In The Alternative To Alter Or Amend The Judgment." Upon consideration and for the reasons stated below, plaintiffs motion shall be granted in part and denied in part.

Plaintiffs instituted this action challenging Ordinance Number 160-1978, "amending and supplementing the Codified Ordinances of the City of Akron, Ohio, 1975, by the amendment of Chapter 1870, entitled 'Regulation of Abortions,'" on April 19, 1978. The Court duly heard testimony and received exhibits addressed to the constitutionality of the various sections of Ordinance Number 160-1978. By its Memorandum Opinion and Order of August 22, 1979, the Court found certain sections of the challenged ordinance constitutional; found certain other sections unconstitutional; and determined that plaintiffs lacked standing to challenge the remaining sections. By the instant motion, plaintiffs seek reconsideration of that part of the Court's opinion finding that they lacked standing to challenge Section 1870.03 of Akron Ordinance 160-1978.

The defendant-intervenors have opposed the plaintiffs' motion for a new trial arguing that it should be denied because of the plaintiffs' failure to comply with Rule 59(b). Rule 59(b) states that a motion for a new trial shall be served not later than ten days after the entry of judgment. Defendant-intervenors recognize that plaintiffs' motion was timely filed, but say that because they were not served with the motion within the ten day time period the motion must be denied.

While it would have been preferable for the plaintiffs to give service to all groups involved, the plaintiffs' failure to send notice to defendant-intervenors was apparently due to their understanding that the interests of minors, represented by the defendant-intervenors, were not implicated by the substantive arguments raised in the motion. To the extent that a motion under Rule 59 affects the time for appeal for all persons involved in the action, notice should be sent to all persons who have appeared. See Rule 4(a)(4), Federal Rules of Appellate Procedure. The crucial aspect of Rule 59 is the ten day period. 6A Moore's Federal Practice ¶ 59.09. Construing Rule 59 in light of Rule 1, Federal Rules of Civil Procedure, the Court determines that plaintiffs' motion for a new trial is proper and the Court will consider the merits of the issues raised.

Section 1870.03 is as follows:

> No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed in a hospital.

Plaintiffs did not brief their standing to attack this section of Akron's ordinance prior to the Court's issuance of its opinion. Further, there was evidence that none of the plaintiffs engaged in performance of abortions subsequent to the end of the first trimester. The coordinator of the Akron Women's Clinic, however, did express a desire to engage in performance of abortions during the early part of the second trimester. When questioned at trial as to why her clinic did not provide such abortions, she testified that Akron already had an ordinance that prevented provision of such abortions in a clinic setting. Based upon that testimony, the Court concluded:

> If Section 1870.03 were declared unconstitutional . . . such abortions could still not be performed in a clinic because of a preexisting Akron ordinance that is not here under attack. Plaintiffs, therefore, lack standing to challenge Section 1870.03.

Plaintiffs have now, by their brief in support of the instant motion, addressed their standing to challenge Section 1870.03. Apparently, the preexisting ordinance to which the coordinator of Akron Women's Clinic made reference was also numbered 1870.03 and was in all respects identical to the section here under consideration. Further, Section 2 of Ordinance Number 160-1978 provided:

> That the existing Sections 1870.01, 1870.02, and 1870.03 of the Codified Ordinances of the City of Akron, Ohio, 1975, enacted by Ordinance No. 993-1976, be and hereby are repealed.

Accordingly, based upon the facts plaintiffs have now brought to the Court's attention, that part of its Memorandum Opinion and Order of August 22nd finding plaintiff Akron Women's Clinic without standing to challenge Section 1870.03 of Ordinance Number 160-1978 shall be vacated. Reaching the merits of the plaintiffs' constitutional challenge, the Court finds Section 1870.03 constitutional and plaintiffs' request for declaratory and injunctive relief in regard to it shall be denied.

In *Roe v. Wade,* 410 U.S. 113, 153, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Supreme Court held that the Fourteenth Amendment's protection of certain aspects of personal privacy included a guarantee that a woman could decide whether to terminate her pregnancy without unjustified state interference. Inasmuch as the woman's right to make an unencumbered decision concerning abortion was found in the "fundamental right" of privacy, the Court stated that interference with that right could be justified only by a "compelling state interest." *Roe, supra* at 155, 93 S. Ct. 705. The Court further recognized that the state had a valid interest in maternal health and the protection of potential human life. The state's interest in potential human life was found to become "compelling" at viability. The state's interest in protecting maternal health, "in the light of present medical knowledge," was found to become "compelling" at approximately the end of the first trimester. *Roe, supra* at 163, 93 S. Ct. at 731. Section 1870.03 was passed in furtherance of this asserted compelling state interest in protecting maternal health from the close of the first trimester of pregnancy.

Plaintiffs' attack Section 1870.03 saying that although abortions beyond the end of the first trimester of pregnancy were safer in a hospital setting at the time of the *Roe* decision, that is no longer true. Plaintiffs presented evidence in the form of testimony and exhibits to support a finding that early second trimester clinical abortions are now just as safe as early second trimester hospital abortions. The Court, however, does not find plaintiffs' evidence on this issue so convincing that it is willing to discard the Supreme Court's formulation in *Roe.* Accordingly, the Court finds that Section 1870.03 furthers the compelling state interest in protection of maternal health and is, therefore, constitutional.

Based upon the foregoing, plaintiffs' "Motion For A New Trial Or In The Alternative To Alter Or Amend Judgment," is hereby granted in part and denied in part. That part of the Court's Memorandum Opinion and Order finding Akron Women's Clinic without standing to challenge Section 1870.03 of Ordinance 160-1978 is hereby vacated. Further, Section 1870.03 is hereby found to be constitutional and plaintiffs' request for declaratory and injunctive relief is hereby denied.

IT IS SO ORDERED.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C78-155A

[Filed: Feb. 27, 1980]

AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., *et al.*,
Plaintiffs,

v.

CITY OF AKRON, *et al.*,
Defendants.

ORDER

Presently pending before the Court in the above captioned matter are cross-motions of plaintiffs and defendants for attorneys' fees. Also pending is 'the motion by defendant-intervenors for review of taxation of costs. Upon consideration and for the reasons stated below, all motions shall be denied without prejudice.

Invoking the Court's jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) & (4), plaintiffs initiated this action for injunctive and declaratory relief to redress alleged deprivations of their constitutional rights in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment.

The Sixth Circuit Court of Appeals recently held that the district court may reasonably postpone a determination of the amount of an attorney's fee award until after all appeals on the merits of the case have been completed. *Memphis Sheraton Corp. v. Kirkley,* Nos. 77-1570 et al., at 5 (6th Cir. Feb. 5, 1980). In dictum the Court of Appeals noted, "The Supreme Court pointed out in *Sprague* [*v. Ticonic National Bank,* 307 U.S. 161, 168 (1938)] that the final disposition of the case, including appeals, places the claim for attorney fees in a much better perspective than it would have at an earlier stage."

In the interest of justice, the Court finds that a decision regarding an award of fees at this point in the present litigation would be premature. Plaintiffs who prevail in an action to enforce a provision of 42 U.S.C. § 1983 are entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988. *Christiansburg Garment Co. v. E.E.O.C.,* 434 U.S. 412, 417 (1978). Under *Northcross v. Memphis Board of Education,* Nos. 78-1298, et al., at 16-18 (6th Cir. Nov. 26, 1978), once the Court has determined that a plaintiff is the prevailing party, the plaintiff recovers all attorneys' fees arising out of the litigation unless special circumstances would render the award unjust.[1] As a dispute remains in the instant case regarding whether the plaintiffs have in fact prevailed, the Court awaits final resolution of the merits of the case before deciding whether an award should be granted.

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[1] The Court recognizes the apparent inconsistency between *Northcross* and a subsequent case, *Mahoning Womens Center v. Hunter,* Nos. 77-3406, et al. (6th Cir. Dec. 18, 1979). Although the plaintiff in *Mahoning* was the prevailing party, the Court of Appeals approved the district court's finding that no award was to be made. Because of today's ruling, the conflict between the cases need not be addressed at the present time.

Accordingly, the motions are hereby denied without prejudice and with leave to renew such motions upon conclusion of appeals on the merits of the case.

It is so ordered.

Leroy J. Contie, Jr.
U.S. District Judge

APPENDIX H

AKRON ORDINANCE NO. 160-1978

JEH:WFS:CT 2-27-78
Subst. Ord. offered as an amendment
2-28-78

HEALTH AND SOCIAL SERVICE

Offered by GOEHLER, KAPPER, GREISSING

ORDINANCE No. 160-1978 amending and supplementing the Codified Ordinances of The City of Akron, Ohio, 1975, by the amendment of Chapter 1870, entitled "Regulation of Abortions".

WHEREAS, the citizens of Akron are entitled to the highest standard of health care; and

WHEREAS, abortion is a major surgical procedure which can result in complications, and adequate equipment and personnel should be required for its safe performance in order to insure the highest standards of care for the protection of the life and health of the pregnant woman; and

WHEREAS, abortion should be performed only in a hospital or in such other special outpatient facility offering the maximum safeguards to the life and health of the pregnant woman; and

WHEREAS, it is the finding of Council that there is no point in time between the union of sperm and egg, or at least the blastocyst stage and the birth of the infant at which point we can say the unborn child is not a human life, and that the changes occurring between implantation, a six-weeks embryo, a six-month fetus, and a one-week-old child, or a mature adult are merely stages of development and maturation; and

Whereas, traditionally the physician has been responsible for the welfare of both the pregnant woman and her unborn child, and that while situations of conflict may arise between a pregnant woman's health interests and the welfare of her unborn child, the resolution of such conflicts by inducing abortion in no way implies that the physician has an adversary relationship towards the unborn child; and

Whereas, Council therefore wishes to affirm that the destruction of the unborn child is not the primary purpose of abortion and that consequently Council recognizes a continuing obligation on the part of the physician towards the survival of a viable unborn child where this obligation can be discharged without additional hazard to the health of the pregnant woman; and

Whereas, Council, after extensive public hearings and investigations concludes that enactment of this ordinance is a reasonable and prudent action which will significantly contribute to the preservation of the public life, health, safety, morals, and welfare.

Now, therefore, be it enacted by the Council of The City of Akron:

Section 1. That the Codified Ordinances of the City of Akron, Ohio, 1975, are hereby amended and supplemented by the amendment of Chapter 1870, so as to read as follows:

"CHAPTER 1870

"1870.01 DEFINTIONS

"As used in this Chapter:

"(A) 'Abortion' means the purposeful termination of a human pregnancy after implantation of a fertilized ovum, by any person, including the pregnant woman herself, with an intention other than to necessarily produce a live birth or to remove a dead unborn child.

"(B) 'Hospital' means a general hospital or special hospital devoted to gynecology or obstetrics which is accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association.

"(C) 'Unborn child' means the unborn offspring of human beings from the moment of conception, through pregnancy and until live birth, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus.

"(D) 'Viable' means potentially able to live outside of the womb of the mother upon premature birth whether resulting from natural causes or an abortion, or otherwise, and whether that potentiality exists in part due to the provision or availability of natural or artificial life-support systems.

"(E) 'Conception' means the fertilization of the ovum of a female individual by the sperm of a male individual.

"(F) 'Health' means physical or mental health.

"(G) 'Abortion facility' means a clinic, physician's office, or any other place or facility in which abortions are performed, other than a hospital.

"(H) 'Physician' means a person licensed to practice medicine in the State of Ohio.

"(I) 'Department of Public Health' means the Department of Public Health of the City of Akron.

"1870.02 ABORTION BY LICENSED PHYSICIAN

"No person shall perform or induce an abortion upon a pregnant woman unless that person is a physician licensed to practice medicine in the State of Ohio and such abortion is performed in a hospital or an abortion facility.

"1870.03 ABORTION IN HOSPITAL

"No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed in a hospital.

"1870.04 ABORTION AFTER VIABILITY

"(A) No physician shall perform or induce an abortion upon a pregnant woman after such time as her unborn child has become viable, unless such abortion is necessary to prevent the death of the pregnant woman or to prevent impairment to her health. Before a physician may perform or induce an abortion upon a pregnant woman after such time as her unborn child has become viable, such physician shall first certify in writing that the abortion is necessary to prevent the death of the pregnant woman or to prevent impairment to her health and shall further certify in writing the medical indications for such abortion and the probable health consequences if the abortion is not performed or induced.

"(B) An unborn child shall be presumed to be viable if more than twenty-four (24) weeks have elapsed from the probable beginning of the last menstrual period of the pregnant woman, based upon either information provided by her or through examination by her attending physician. If it is the judgment of the attending physician that the particular unborn child is not viable where the presumption of viability exists, then before such physician may perform or induce an abortion upon the pregnant woman he shall first certify in writing that the particular unborn child is not viable and shall further certify the precise medical findings upon which he bases that judgment.

"(C) Any physician who shall perform or induce an abortion upon a pregnant woman where the presumption of viability exists shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child, unless that method or technique would present a significantly greater risk to the life or health of the pregnant woman than another available method or technique to be actually utilized, and the physician so certifies in writing.

"(D) An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance or inducement of the abortion, the physician performing or inducing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the unborn child.

"1870.05 NOTICE AND CONSENT

"(A) No physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of the parents or guardian, computed from the time of mailing, unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman.

"(B) No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, and

"(1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or

"(2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

"1870.06 INFORMED CONSENT

"(A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, given freely and without coercion.

"(B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05 (B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows:

"(1) That according to the best judgment of her attending physician she is pregnant.

"(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.

"(3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.

"(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

"(5) That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

"(6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests.

"(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

"(C) At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

"(D) The attending physician performing or inducing the abortion shall provide the pregnant woman, or one of her parents or legal guardian signing the consent form where applicable, with a duplicate copy of the consent form signed by her, and one of her parents or her legal guardian where applicable, in accordance with Paragraph (B) of this Section.

"1870.07 WAITING PERIOD

"No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have signed the consent form required by Section 1870.06 of this Chapter, and the physician so certifies in writing that such time has elapsed.

"1870.08 RECORDS

"All abortion facilities and hospitals in which abortions are performed or induced shall keep records, including admission and discharge notes, histories, results of tests and examinations, nurses work sheets, social service records, and progress notes, and shall further keep a copy of all written certifications provided for in this Chapter as well as a copy of records of constructive work consent forms, abortion reports, and complication reports provided for in Sections 1870.05, 1870.06 and 1870.10 of this Chapter. Such records shall be maintained in the permanent files of the hospital or abortion facility for a period of not less than seven (7) years.

"1870.09 INSPECTION

"(A) The medical records and the physical facilities of all abortion facilities and hospitals in which abortions are performed shall be open to inspection at any time by the Department of Public Health for purposes of gathering statistical data and insuring compliance with the provisions of this Chapter.

"(B) The medical records of abortion facilities and hospitals in which abortions are performed and all information contained therein shall remain confidential and shall be used by the Department of Public Health only for the purposes set forth in Paragraph (A) of this Section.

"(C) The Department of Public Health shall physically inspect all abortion facilities at least once every six (6) months to insure compliance with this Chapter and all laws, ordinances, rules and regulations of the State of Ohio and City of Akron concerning health and sanitation.

"1870.10 REPORTING

"(A) An individual abortion report for each abortion performed or induced upon a woman shall be completed by her attending physician. The report shall be confidential and shall not contain the name of the woman. This report shall include:

"(1) Patient number.

"(2) Name and address of the abortion facility or hospital.

"(3) Date of abortion.

"(4) Zip code of residence of pregnant woman.

"(5) Age of pregnant woman.

"(6) Race.

"(7) Marital status.

"(8) Number of previous pregnancies.

"(9) Years of education.

"(10) Number of living children.

"(11) Number of previous induced abortions.

"(12) Date of last induced abortion.

"(13) Date of last live birth.

"(14) Method of contraception at time of conception.

"(15) Date of beginning of last menstrual period.

"(16) Medical condition of woman at time of abortion.

"(17) RH type of pregnant woman.

"(18) Type of abortion procedure.

"(19) Complications by type.

"(20) Type of procedure done after the abortion.

"(21) Type of family planning recommended.

"(22) Type of additional counselling given.

"(23) Signature of attending physician.

"(24) The certifications provided for in this Chapter.

"(B) An individual complication report for any post-abortion care performed upon a woman shall be completed by the physician providing such post-abortion care. This report shall include:

"(1) The date of the abortion.

"(2) The name and address of the abortion facility or hospital where the abortion was performed.

"(3) The nature of the abortion complication diagnosed or treated.

"(C) All abortion reports shall be signed by the attending physician and submitted to the Department of Public Health within 30 days from the date of the abortion. All complication reports shall be signed by the physician providing the post-abortion care and submitted to the Department of Public Health within 30 days from the date of the post-abortion care.

"(D) A copy of the abortion report shall be made a part of the medical record of the patient of the facility or hospital in which the abortion was performed.

"(E) The Department of Public Health shall be responsible for collecting all abortion reports and complication reports and collating and evaluating all data gathered therefrom, and shall annually publish a statistical report based on such data from abortions performed in the previous calendar year.

"1870.11 FORMS

"(A) The Department of Public Health shall make available to physicians performing abortions in the City of Akron constructive notice forms, consent forms, abortion report forms and complication report forms as provided for in Sections 1870.05, 1870.06 and 1870.10 of this Chapter.

"(B) The Department of Public Health shall make available to all physicians, who may perform post-abortion care, complication report forms as provided for in Section 1870.10 of this Chapter.

"(C) The Department of Public Health shall prepare and make available to all physicians performing abortions in the City of Akron, a current list of all public and private agencies and services available for use in accordance with Sections 1870.06(B)(11) and 1870.06(B)(12) of this Chapter.

"1870.12 EMERGENCY

"The following provisions of this Chapter shall not apply where there is an emergency need for an abortion to be performed or induced such that continuation of the pregnancy poses an immediate threat and grave risk to the life or physical health of the pregnant woman, and the attending physician so certifies in writing:

"(A) Section 1870.05.

"(B) Section 1870.06(B) with respect to the signature of one of the parents or the legal guardian of the pregnant woman where applicable.

"(C) Section 1870.07.

"(D) Section 1870.13.

"(E) Section 1870.14(B) with respect to aftercare of an abortion patient.

"1870.13 MUNICIPAL HOSPITALS

"No hospital or other health facility owned or operated by the City of Akron shall permit its premises, facilities, or equipment to be used for the purpose of performing or inducing an abortion upon a pregnant woman.

"1870.14 FREEDOM OF CONSCIENCE

"(A) No private hospital, hospital director, or governing board of a private hospital, within the City of Akron, is required to permit abortions to be performed in such hospital. Refusal to permit an abortion is not a basis for disciplinary or other recriminatory action.

"(B) No person may be required to perform or participate in medical procedures which result in an abortion, which are in preparation for an abortion, or which involves aftercare of an abortion patient, and refusal to perform or participate in such medical procedures is not a basis for disciplinary or other recriminatory action.

"1870.15 EXPERIMENTATION

"No person shall experiment upon or sell a live child or unborn child unless such experimentation is therapeutic to the child or unborn child.

"1870.16 DISPOSAL OF REMAINS

"Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner.

"1870.17 INSTRUCTIONS TO BE PROVIDED SUBSEQUENT TO ABORTION.

"Any physician who shall perform or induce an abortion, shall, subsequent to that abortion being performed or induced, provide his patient with specific oral and written medical instructions to be followed by that patient in order to insure her safe recovery from the abortion.

"1870.18 PENALTY

"(A) Whoever violates Sections 1870.02, 1870.03, 1870.04, 1870.05, 1870.06, 1870.07, 1870.08, 1870.10, 1870.14, 1870.15 or 1870.17 of this Chapter shall be deemed guilty of a misdemeanor of the first degree and punished as provided for in Section 698.02 of the Codified Ordinances of the City of Akron, Ohio, 1975.

"(B) Whoever violates any other provision of this Chapter shall be deemed guilty of a misdemeanor of the third degree and punished as provided for in Section 698.02 of the Codified Ordinances of the City of Akron, Ohio, 1975.

"1870.19 SEVERABILITY

"Should any provision of this Chapter be construed by any court of law to be invalid, illegal, unconstitutional, or otherwise unenforcible, such invalidity, illegality, unconstitutionality, or unenforcibility shall not extend to any other provision or provisions of this Chapter."

Section 2. That the existing Sections 1870.01, 1870.02, and 1870.03 of the Codified Ordinances of the City of Akron, Ohio, 1975, enacted by Ordinance No. 993-1976, be and hereby are repealed.

Section 3. That this ordinance shall take effect and be in force May 1, 1978.

Passed: February 28, 1978, but not as an emergency.

/s/ Edward Davis Clerk of Council	/s/ Ray Kapper President of the Council

Approved: ______________________, 1978

____
Mayor

Akron, Ohio, March 13, 1978

I hereby certify that Ordinance No. 160-1978 was returned by the Mayor unsigned and without written objections.

/s/ Edward Davis
Clerk of Council

APPENDIX I

OHIO REVISED CODE CHAPTER 2151

2151.01 The Sections in Chapter 2151 of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151 of the Revised Code;

(B) To protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefor a program of supervision, care, and rehabilitation;

(C) To achieve the foregoing purposes, whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety;

(D) To provide judicial procedures through which Chapter 2151 of the Revised Code is executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

2151.011

(A) As used in the Revised Code:

(1) "Juvenile court" means the division of the court of common pleas or a juvenile court separately and independently created having jurisdiction under Chapter 2151 of the Revised Code.

(2) "Juvenile judge" means a judge of a court having jurisdiction under Chapter 2151 of the Revised Code.

(B) As used in this chapter:

(1) "Child" means a person who is under the age of eighteen years, with the exception that any child who violates a federal or state law or municipal ordinance prior to attaining eighteen years of age shall be deemed a "child" irrespective of his age at the time the complaint is filed or hearing had thereon.

(2) "Adult" means an individual eighteen years of age or older.

(3) "Detention" means the temporary care of children in restricted facilities pending court adjudication or disposition.

(4) "Shelter" means the temporary care of children in physically unrestricted facilities pending court adjudication or disposition.

(5) "Foster home" means a family home in which any child is received apart from his parents for care, supervision, or training.

(6) "Certified foster home" means a foster home operated by persons holding a permit in force, issued under sections 5103.03 to 5103.05 of the Revised Code.

(7) "Approved foster care" means facilities approved by the youth commission under sections 5139.36 to 5139.40 of the Revised Code.

(8) "Organization" means any institution, public, semipublic, or private, and any private association, society, or agency located or operating in the state, incorporated or unincorporated, having among its functions the furnishing of protective services or care for children, or the placement of children in foster homes or elsewhere.

(9) "Certified organization" means any organization mentioned under division (B)(8) of this section which holds a certificate in force, issued under sections 5103.03 to 5103.05 of the Revised Code.

(10) "Legal custody" means a legal status created by court order which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and

responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(11) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the person, including but not necessarily limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(12) "Permanent custody" means a legal status created by the court which vests in the county department of welfare which has assumed the administration of child welfare, county children services board, or certified organization, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.

(13) "Temporary custody" means legal custody as defined in division (B)(10) of this section which may be terminated at any time at the discretion of the court.

(14) "Commit" means to vest custody as ordered by the court.

(15) "Probation" means a legal status created by court order following an adjudication that a child is delinquent, a juvenile traffic offender, or unruly whereby the child is permitted to remain in the parent's, guardian's, or custodian's home subject to supervision, or under the supervision of any agency designated by the court and returned to the court for violation of probation at any time during the period of probation.

(16) "Protective supervision" means a legal status created by court order whereby the child is permitted to remain in the parent's guardian's, or custodian's home under supervision and subject to return to the court during the period of protective supervision.

(17) "Adequate parental care" means the provision of adequate food, clothing, and shelter to ensure a child's health and physical safety and the provision of specialized services warranted by a child's physical or mental needs.

2151.23

(A) The juvenile court has exclusive original jurisdiction under the Revised Code:

(1) Concerning any child who on or about the date specified in the complaint is alleged to be a juvenile traffic offender, delinquent, unruly, abused, neglected, or dependent;

(2) To determine the custody of any child not a ward of another court of this state;

(3) To hear and determine any application for a writ of habeas corpus involving the custody of a child;

(4) To exercise the powers and jurisdiction given the probate division of the court of common pleas in Chapters 5122 and 5123 of the Revised Code, if the court has probable cause to believe that a child otherwise within the jurisdiction of the court is a mentally ill person subject to hospitalization by court order, as defined in section 5122.01 of the Revised Code, or a mentally retarded person subject to hospitalization by court order as defined in section 5123.68 of the Revised Code;

(5) To hear and determine all criminal cases charging adults with the violation of any section of Chapter 2151 of the Revised Code;

(6) Under the interstate compact on juveniles in section 2151.56 of the Revised Code;

(7) To hear and determine applications for consent to marry pursuant to section 3101.04 of the Revised Code.

(B) The juvenile court has original jurisdiction under the Revised Code:

(1) To hear and determine all cases of misdemeanors charging adults with any act or omission with respect to any child, which act or

omission is a violation of any state law or any municipal ordinance;

(2) To determine the paternity of any child alleged to have been born out of wedlock pursuant to Chapter 3111 of the Revised Code;

(3) Under the uniform support of dependents act in Chapter 3115 of the Revised Code;

(C) The juvenile court, except as to juvenile courts which are a separate division of the court of common pleas, or a separate and independent juvenile court, has jurisdiction to hear, determine, and make a record of any action for divorce or alimony involving the custody or care of children filed in the court of common pleas and certified by the court of common pleas with all the papers filed therein to the court for trial, provided that no such certification shall be made to any court unless the consent of the juvenile judge is first obtained. After such certification is made and consent obtained, the court shall proceed as if such action were originally begun in said court except as to awards for alimony or support due and unpaid at the time of certification, over which the court has no jurisdiction.

(D) The juvenile court has jurisdiction to hear and determine all matters as to custody and support of children duly certified by the court of common pleas to the juvenile court after a divorce decree has been granted, including jurisdiction to modify the judgment and decree of the common pleas court as the same relate to the custody and support of children.

(E) The juvenile court has jurisdiction to hear and determine the case of any child certified to the court by any court of competent jurisdiction if such child comes within the jurisdiction of the court as defined by this section.

(F) The juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.21 to 3109.36 of the Revised Code.

2151.28

(A) After the complaint has been filed, the court shall fix a time for hearing, which, if the child is in detention, shall not be later than ten days after the filing of the complaint. It shall direct the issuance of a summons directed to the child except as provided by this section, the parents, guardian, custodian, or other person with whom the child may be and such other persons as appear to the court to be proper or necessary parties to the proceedings, requiring them to appear before the court at the time fixed to answer the allegations of the complaint. A child alleged to be abused, neglected, or dependent shall not be summoned unless the court so directs. A summons issued for a child who is under fourteen years of age and who is alleged to be a delinquent or unruly child or a juvenile traffic offender shall be served on his parent, guardian, or custodian in his behalf.

If the person who has physical custody of the child, or with whom the child resides, is other than the parent or guardian, then the parents and guardian shall also be summoned. A copy of the complaint shall accompany the summons.

If the complaint contains a prayer for permanent custody in a neglect or dependency case, the summons served on the parents shall contain an explanation that the granting of such custody permanently divests the parents of their parental rights and privileges.

(B) The court may endorse upon the summons an order directing the parents, or guardian of the child, or other person with whom the child may be to appear personally at the hearing and directing the person having the physical custody or control of the child to bring the child to the hearing.

(C) The summons shall contain a statement advising that any party is entitled to counsel in the proceedings and that the court will appoint counsel or designate a county public defender or joint county public defender to provide legal representation if the party is indigent.

(D) If it appears from affidavit filed or from sworn testimony before the court that the conduct, condition, or surroundings of the child are endangering his health or welfare or those of others, or that he may abscond or be removed from the jurisdiction of the court or will not be brought to the court, notwithstanding the service of the summons, the court may endorse upon the summons an order that a law enforcement officer shall serve the summons and shall take the child into immediate custody and bring him forthwith to the court.

(E) A party, other than the child, may waive service of summons by written stipulation.

(F) Before any temporary commitment is made permanent, the court shall fix a time for hearing and shall cause notice by summons to be served upon the parent or guardian of the child, or published, as provided in section 2151.29 of the Revised Code. Such summons shall contain an explanation that the granting of permanent custody permanently divests the parents of their parental rights and privileges.

(G) Any person whose presence is considered necessary and who is not summoned may be subpoenaed to appear and testify at the hearing. Any one summoned or subpoenaed to appear who fails to do so may be punished, as in other cases in the court of common pleas, for contempt of court. Persons subpoenaed shall be paid the same witness fees as are allowed in the court of common pleas.

2151.421 Any attorney, physician, including a hospital intern or resident, dentist, podiatrist, practitioner of a limited branch of medicine or surgery as defined in section 4731.15 of the Revised Code, registered or licensed practical nurse, visiting nurse, or other health care professional, licensed psychologist, speech pathologist or audiologist, coroner, administrator or employee of a child day-care center, or administrator or employee of a certified child care agency or other public or private children services agency, school teacher or school authority, social worker, or person rendering spiritual treatment through prayer in accordance with the tenets of a well recognized religion, acting in his official or professional capacity, having reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of the child, shall immediately report or cause reports to be made of such information to the children services board or the county department of welfare exercising the children services function, or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred.

Anyone having reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or other condition of such nature as to reasonably indicate abuse or neglect of the child may report or cause reports to be made of such information to the children services board or the county department of welfare exercising the children services function, or to a municipal or county peace officer.

The reports shall be made forthwith by telephone or in person forthwith, and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(A) The names and addresses of the child and his parents or person or persons having custody of such child, if known;

(B) The child's age and the nature and extent of the child's injuries, abuse, or neglect, including any evidence of previous injuries, abuse, or neglect;

(C) Any other information which might be helpful in establishing the cause of the injury, abuse, or neglect.

Any person who is required to report cases of child abuse or neglect may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

When the attendance of the physician is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the necessary reports.

Upon the receipt of a report concerning the possible abuse or neglect of a child, the municipal or county peace officer shall refer such report to the appropriate county department of welfare or chidren services board.

No child upon whom a report is made shall be removed from his parents, stepparents, guardian, or other persons having custody by a municipal or county peace officer without consultation with the children services board or the county department of welfare exercising the children services function unless, in the judgment of the reporting physician and the officer, immediate removal is considered essential to protect the child from further abuse or neglect.

The county department of welfare or children services board shall investigate, within twenty-four hours, each report referred to it under this section to determine the circumstances surrounding the injury or injuries, abuse, or neglect, the cause thereof, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency. The county department of welfare or children services board shall report each case to a central registry which the state department of public welfare shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. The department or board shall submit a report of its investigation, in writing to the law enforcement agency.

The county department of welfare or children services board shall make such recommendations to the county prosecutor or city director of law as it deems necessary to protect such children as are brought to its attention.

Anyone or any hospital, institution, school, health department, or agency participating in the making of the reports, or anyone participating in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability that might otherwise be incurred or imposd as a result of such actions. Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause thereof in any judicial proceeding resulting from a report submitted pursuant to this section.

Nothing in this section shall be construed to define as an abused or neglected child any child which is under spiritual treatment through prayer in accordance with the tenets and practice of a well-recognized religion in lieu of medical treatment, and no report shall be required as to the child.

Any report made under this section is confidential, and any person who permits or encourages the unauthorized dissemination of its contents is guilty of a misdemeanor of the fourth degree.

Reports required by this section shall result in protective services and emergency supportive services being made available by the county department of welfare or children services board on behalf of children about whom the reports are made, in an effort to prevent further neglect or abuse, to enhance their welfare, and whenever possible, to preserve the family unit intact. The department of public welfare shall exercise rule-making authority under Chapter 119 of the Revised Code to aid in the implementation of this section.

There shall be placed on file with the juvenile court in each county and the department of public welfare an initial plan of cooperation jointly prepared and subscribed to by a committee consisting of the county peace officer, all chief municipal peace officers within the county, the prosecuting attorney of the county and the director of law of each city, and the children services board or county welfare department exercising the children services function as convened by the county welfare director. The plan shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and section 2151.41 of the Revised Code. The plan shall include a system for cross-referral of reported cases of abuse and neglect as necessary, and shall also include the name and title of the official directly responsible for making reports to the central registry.

APPENDIX J

OHIO RULES OF JUVENILE PROCEDURE

Rule 2 As used in these rules:

(1) "Adjudicatory hearing" means a hearing to determine whether a child is a juvenile traffic offender, delinquent, unruly, neglected, or dependent or otherwise within the jurisdiction of the court or whether temporary legal custody should be converted to permanent custody.

(2) "Child" means a person who is under the age of eighteen years. A child who violates a federal or state law or municipal ordinance prior to attaining eighteen years of age shall be deemed a child irrespective of his age at the time the complaint is filed or hearing had thereon.

(3) "Complaint" means the legal document which sets forth the allegations which form the basis for juvenile court jurisdiction.

(4) "Court proceeding" means all action taken by a court from the earlier of (a) the time a complaint is filed and (b) the time a person first appears before an officer of a juvenile court until the court relinquishes jurisdiction over such child.

(5) "Custodian" means a person who has been granted custody of a child by a court.

(6) "Detention" means the temporary care of

children in restricted facilities pending court adjudication or disposition, or execution of a court order.

(7) "Detention hearing" means a hearing to determine whether a child shall be held in detention or shelter care prior to or pending execution of a final dispositional order.

(8) "Dispositional hearing" means a hearing to determine what action shall be taken concerning a child who is within the jurisdiction of the court.

(9) "Guardian" means a court appointed guardian of the person of a child.

(10) "Guardian ad litem" means a person appointed to protect the interests of a party in a juvenile court proceeding.

(11) "Hearing" means any portion of a juvenile court proceeding before the court, whether summary in nature or by examination of witnesses.

(12) "Indigent person" means a person who, at the time his need is determined, is unable by reason of lack of property or income to provide for full payment of legal counsel and all other necessary expenses of representation.

(13) "Juvenile court" means a division of the court of common pleas, or a juvenile court separately and independently created, having jurisdiction under R. C. Chapter 2151.

(14) "Juvenile judge" means a judge of a court having jurisdiction under R. C. Chapter 2151.

(15) "Mental examination" means an examination by a psychiatrist or psychologist.

(16) "Party" means a child who is the subject of a juvenile court proceeding, his spouse, if any, his parent, or if the parent of a child be himself a child, the parent of such parent and, in appropriate cases, his custodian, guardian, or guardian ad litem, the state and any other person specifically designated by the court.

(17) "Person" includes an individual, association, corporation, or partnership and the state or any of its political subdivisions, departments, or agencies.

(18) "Physical examination" means an examination by a physician.

(19) "Rule of court" means a rule promulgated by the supreme court or a rule concerning local practice adopted by another court which is not inconsistent with the rules promulgated by the supreme court and which rule is filed with the supreme court.

(20) "Shelter care" means the temporary care of children in physically unrestricted facilities, pending court adjudication or disposition, or execution of a court order.

(21) "Social history" means the personal and family history of a child or any other party to a juvenile proceeding and may include the prior record of the person with the juvenile court or any other court.

(22) "Ward of court" means a child over whom the court assumes continuing jurisdiction.

Rule 10

(A) Filing. Any person having knowledge of a child who appears to be a juvenile traffic offender, delinquent, unruly, neglected, dependent, or abused may file a complaint with respect to such child in the juvenile court of the county in which the child has a residence or legal settlement, or in which the traffic offense, delinquency, unruliness, neglect, dependency, or abuse occurred.

Any person may file a complaint to have determined the custody of a child not a ward of another court of this state, and any person entitled to the custody of a child and unlawfully deprived of such custody may file a complaint requesting a writ of habeas corpus. Complaints concerning custody shall be filed in the county where the child is found or was last known to be.

When a case concerning a child is transferred or certified from another court, the certification from the transferring court shall be deemed to be the complaint. The juvenile court may order the certification supplemented upon its own motion or that of a party.

(B) Complaint: general form. The complaint, which may be upon information and belief, shall:

(1) State in ordinary and concise language the essential facts which bring the proceeding within the jurisdiction of the court and in juvenile traffic offense and delinquency proceedings shall contain the numerical designation of the statute or ordinance alleged to have been violated;

(2) Contain the name and address of the parent, guardian, or custodian of the child or, if such name or address is unknown, shall so state; and

(3) Be made under oath.

(C) Complaint: Juvenile traffic offense. A Uniform Traffic ticket shall be used as a complaint in juvenile traffic offense proceedings.

(D) Complaint: Permanent custody. A complaint seeking permanent custody of a child shall so state.

(E) Complaint: Habeas corpus. Where a complaint for a writ of habeas corpus involving the custody of a child is based on the existence of a lawful court order, a certified copy of such order shall be attached to the complaint.

Opposition

Office-Supreme Court, U.S.
FILED
DEC 10 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 81-746, 81-854

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CITY OF AKRON, et al.,
Petitioners,
vs.
AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., et al.,
Respondents

FRANCOIS SEGUIN, et al.,
Petitioners,
vs.
AKRON CENTER FOR REPRODUCTIVE
HEALTH, INC., et al.,
and
CITY OF AKRON, et al.,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should abandon the constitutional test it established in Roe v. Wade, 410 U.S. 113 (1973), to assess the constitutionality of regulations restricting abortions.

2. Whether a regulation (Section 1870.05 (B)) vesting parents or judicial officers with an absolute veto of the abortion decision and mandating, in conjunction with Ohio Revised Code Chapter 2151, parental notification in the case of every woman under the age of fifteen regardless of her best interests or maturity, is unconstitutional.

3. Whether an inflexible regulation (Section 1870.06(B)) mandating that the physician, upon threat of criminal penalty, recite to every patient seeking an abortion at least 44 lines of printed material including medically inaccurate, biased, and irrelevant information, is unconstitutional.

4. Whether an inflexible and procedurally vague regulation (Section 1870.06(C)) mandating that the "attending physician" upon threat of criminal penalty, in every case personally provide an oral recitation of risk and technique details to each woman seeking an abortion, is unconstitutional because it imposes severe psychological and economic burdens on women seeking abortions in Akron, Ohio.

5. Whether an inflexible regulation (Section 1870.07) mandating that every woman seeking an abortion wait at least twenty-four hours after she has signed an informed consent document before she can obtain an abortion, is unconstitutional because it imposes severe physical, psychological and economic burdens on women seeking abortions in Akron, Ohio.

6. Whether a regulation (Section 1870.16) mandating that fetuses be

disposed of in a "humane" manner is unconstitutionally vague.

PARTIES

The defendant City of Akron has failed to note in its petition that the Mayor of Akron, the Director of Public Health of Akron and the Police Prosecutor of Akron are all parties to the present proceeding. All these public officials were named as defendants in the complaint filed in the District Court and pursuant to Supreme Court Rule 19.6 they remain parties to this proceeding.

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STATUTORY PROVISIONS INVOLVED

The City of Akron Ordinance involved is Ordinance Number 160-1978 (hereinafter referred to by its Akron Codified Ordinance designation, Chapter 1870). It provides in pertinent part:

CHAPTER 1870

* * *

1870.05 NOTICE AND CONSENT

(A) No physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of the parents or guardian, computed from the time of mailing, unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman.

(B) No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, and

(1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or

(2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

1870.06 INFORMED CONSENT

(A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, given freely and without coercion.

(B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05 (B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows:

(1) That according to the best judgment of her attending physician she is pregnant.

(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.

(3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including

pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.

(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

(5) That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

(6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(C) At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

(D) The attending physician performing or inducing the abortion shall provide the pregnant woman, or one of her parents or legal guardian signing the consent form where applicable, with a duplicate copy of the consent form signed by her, and one of her parents or her legal guardian where applicable, in accordance with Paragraph (B) of this Section.

1870.07 WAITING PERIOD

No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have signed the consent form required by Section 1870.06 of this Chapter, and the physician so certifies in writing that such time has elapsed.

* * *

1870.16 DISPOSAL OF REMAINS

Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner.

* * *

1870.18 PENALTY

(A) Whoever violates Sections 1870.02, 1870.03, 1870.04, 1870.05, 1870.06, 1870.07, 1870.08, 1870.10, 1870.14, 1870.15 or 1870.17 of this Chapter shall be deemed guilty of a misdemeanor of the first degree and punished as provided for in Section 698.02 of the Codified Ordinances of the City of Akron, Ohio, 1975.

(B) Whoever violates any other provision of this Chapter shall be deemed guilty of a misdemeanor of the third degree and punished as provided for in Section 698.02 of the Codified Ordinances of the City of Akron, Ohio, 1975.

* * *

All other relevant statutory material may be found in the Appendix to the petition for writ of certiorari of the City of Akron (No. 81-746) except for the relevant sections of Chapter 3701-47 of the Ohio Administrative Code which provide as follows:

3701-47-01 Definitions

As used in rules 3701-47-01 to 3701-47-07 of the Ohio Sanitary Code;

* * *

(E) "Fetus" means the developing conceptus from fourteen (14) weeks after the first day of the woman's last menstrual period until birth.

* * *

3701-47-06 Counseling

(A) The fact of the availability of both pre-abortion and post-abortion counseling for herself and other persons of her choosing shall be made known by the physician, to each woman who is seeking the abortion of a fetus.

(B) Counseling shall be non-judgmental, regardless of the circumstances of the pregnancy, but shall not be forced upon the woman.

(C) The woman shall be treated in a safe, humane and dignified manner during the counseling period and throughout her stay at the place where the abortion is performed.

STATEMENT OF THE CASE

A. History of the Legislation

On February 28, 1978, the Akron City Council, by a vote of seven to six, enacted Chapter 1870, a nine page, 19 section, compendium of regulations restricting the availability of abortions in Akron, Ohio.[1]

The process by which Chapter 1870 was prepared was marked by drastic departures from normal legislative procedure. Chapter 1870 is one of only two bills enacted in an eleven year period over the objection of the City Law Department that the legislation was, in large measure, unconstitutional. (J.A. 321-323;

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1. The legislation enacted was specifically intended by its drafters as a "national model." (Deposition of Marvin Weinberg August 2, 1978.) Chapter 1870 contains a variety of regulations inapplicable to Akron including a prohibition of abortions in municipal hospitals (Section 1870.13) despite the fact that Akron has no such facilities and no intention to acquire them. (Joint Appendix filed in the Court of Appeals at 391-392.)

393-394)[2] Chapter 1870 is the only bill submitted for City Council consideration within at least a three year span drafted by partisan advocates rather than the City Law Department. (J.A. 319) Chapter 1870 is the only legislation in recent memory to have been considered after ex parte hearings from which both the public and legislators opposed to the bill were excluded. (A.E. 72-74) Chapter 1870 is the only piece of legislation ever adopted by the City of Akron to regulate a medical or surgical procedure. Finally, Chapter 1870 was adopted despite statements by the Akron Director of Health, Akron Mayor and Summit County Medical Society that there was no medical or health-related need for such legislation.[3]

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[2] Unless otherwise noted, citations are to the Joint Appendix (J.A.) or Appendix of Exhibits (A.E.) submitted to the United States Court of Appeals for the Sixth Circuit in this case.

B. History of the Litigation

The present litigation was commenced

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[3] C. William Keck, Director of Health of the Akron Department of Health, and a named defendant in this action, stated that the complication rate for Akron clinics is below the national average (A.E. 18), that the rate of major complications in Akron "could hardly be lower" (A.E. 19) and that there has never been a death related to the operation of the Akron clinics. (A.E. 18) His conclusion, based on this and other evidence, was "that from the point of view of protecting the health of the woman involved there is no compelling reason to regulate Akron's abortion facilities." (A.E. 20)

Dr. Charles Bowen, the ranking member of the Maternal and Infant Health Committee of the Summit County Medical Society, reviewed and audited the plaintiff clinics. (A.E. 43) His conclusion on behalf of the Summit County Medical Society was that "there is no medical need for an ordinance to be introduced." (A.E. 44)

John Ballard, the Mayor of the City of Akron, and a named defendant in this action, reached precisely the same conclusion. In a press statement released on March 8, 1978, the Mayor stated that there was "a failure to demonstrate that a need existed for . . . regulation." (A.E. 46) on April 19, 1978, before the Honorable Leroy Contie, Jr., United States District Judge for the Northern District of Ohio, Eastern Division. Plaintiffs sought both injunctive and declaratory relief from the restrictions imposed by Chapter 1870. On April 28, 1978, a temporary restraining order was granted. On May 16, 1978, the District Court permitted intervenors to proceed in this action solely "in their individual capacity as parents of unmarried daughters of childbearing age." Akron Center for Reproductive Health v. City of Akron, 479 F.Supp 1172, 1181 (N.D. Ohio 1979). Trial on the merits took place from September 5 to September 19, 1978.

On August 22, 1979, the District Court issued its decision holding Sections 1870.05(A) and (B) (restricting the availability of abortions to all minors), 1870.06(B) (substituting a script for the informed consent dialogue), 1870.09 (authorizing warrantless searches), and 1870.16 (requiring "humane" disposal of fetal remains) unconstitutional. It upheld a number of sections including 1870.06(C) (counseling exclusively by the attending physician) and 1870.07 (twenty-four hour delay). It determined that plaintiffs were without standing to challenge several other sections of the ordinance.

All parties appealed to the United States Court of Appeals for the Sixth Circuit.[4] As noted by the Court of

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[4] The precise scope of intervenors' appeal is unclear because they filed their appellate briefs as both amici and appellants. In November of 1979, intervenors, in a brief submitted to the District Court concerning the award of attorneys fees, described their intervention as being confined to "those issues surrounding Section 1870.05, Notice and Consent, and those portions of Section 1870.06, Informed Consent, providing for informed consent of parents or legal guardians." (J.A. 862)

Appeals, Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198, 1205 (6th Cir. 1981), defendants did not appeal the District Court's invalidation of Section 1870.05(A) and (B) (restricting the availability of abortions to all minors). Further, defendants specifically conceded that subsections (3), (4), and (5) of Section 1870.06(B) (substituting a script for the informed consent dialogue) were unconstitutional and requested that they be severed from the remainder of that section of the ordinance. Finally, while not conceding that Section 1870.06(C) (counseling exclusively by the attending physician) was vague, defendants and intervenors gave diametrically opposed interpretations of its meaning thereby substantiating plaintiffs' vagueness claim.[5]

On June 12, 1981, the Court of Appeals affirmed the District Court determinations invalidating Sections 1870.05(B) (parental veto and mandatory notification for women under 15), 1870.06(B)(substituting a script for the informed consent dialogue) and 1870.16 ("humane"disposal). It reversed the District Court and held unconstitutional 1870.06(C) (counseling exclusively by the attending physician) and 1870.07 (twenty-four hour delay). The Court of Appeals also held that the District Court had used the wrong constitutional standard in testing the various provisions of the ordinance. Finally, on the basis of H. L. v. Matheson 450 U.S. ____, 101 S. Ct. 1164 (1981), the Court of Appeals reversed, on standing grounds, the ruling of the District Court invalidating 1870.05(A) (requiring parental notification for minors 15-17).[6] Thereafter defendants and intervenors sought certiorari.

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[5] Plaintiffs had asserted that Section 1870.06(C) was vague because it failed to inform the attending physician when to provide the mandated counseling. In defense of the section defendants asserted that the counseling had to be performed at least twenty-four hours in advance of the abortion. (Defendants' Brief of February 28, 1980 at 18) Intervenors reached precisely the opposite conclusion. (Intervenors' Brief of April 8, 1980 at 15)

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[6] Circuit Judge Kennedy filed an opinion concurring in part and dissenting in part. She concluded that three of the five sections of the ordinance on which defendants and intervenors seek review were unconstitutional. (Section 1870.06(B) (script substituted for informed consent dialogue), Section 1870.07 (twenty-four hour delay), Section 1870.16 ("humane" disposal)) She urged the validation of one of the remaining two sections on standing grounds. (Section 1870.05(B) (parental veto and notification for women under 15)) Finally, she dissented on constitutional grounds only with respect to the invalidation of a single section. (1870.06(C) (requiring personal counseling by the attending physician)).

C. The Facts Presented Prove That the Restrictions at Issue Would Substantially Burden Women Seeking Abortions in Akron, Ohio

Defendants and intervenors request that this Court review the decision of the Sixth Circuit invalidating the five ordinance sections listed supra. One of the reasons why this Court should deny the writ is that these sections were invalidated on the basis of an extensive factual presentation heard by the District Court and reviewed by the Court of Appeals.[7]

1. Section 1870.05 (B), requiring parental or judicial consent and mandatory parental notification in the case of every minor under fifteen was proven to be unduly burdensome.

Detailed testimony was provided with respect to the impact of Ordinance

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[7] Plaintiffs presented 28 witnesses and 54 exhibits. Defendants and intervenors presented 17 witnesses and 18 exhibits. The trial record is well over 2,000 pages in length.

Section 1870.05(B) which cedes parents or judicial officers an absolute veto whenever women under fifteen years of age seek abortions and which in conjunction with Ohio Revised Code Chapter 2151, requires parental notification in all such cases regardless of the women's best interest or maturity. As the District Court noted, the intervenors have specifically conceded that notification is required in _all_ cases. _Akron Center for Reproductive Health v. City ofAkron_, 479 F. Supp. at 1202.

The evidence adduced at trial demonstrated that the "veto and notification" rule is burdensome for a variety of reasons. Its existence will impede a significant number of young women from seeking pregnancy-related medical care and will thereby increase the health risk they face. (J.A. 196-201,276-283) Some young women will be forced to seek care outside Akron (J.A.104-105, 201, 279), exposing them to the increased risks associated with travel and diminished opportunities for follow-up care. (J.A. 98-99, 382) For those who seek abortions in Akron the "veto and notification" rule will increase the risk of physical assault by abusive parents (J.A. 280), increase the likelihood of psychological injury (Id.), increase the risk of suicide attempts (Id.) and exacerbate the risk of destructive family strife. (J.A. 102, 200, 211, 280) The evidence also demonstrated that early abortion is far safer for young women than forced childbirth. (J.A. 194-195, 209-210, 274-275, 332-333, 339-343).

This criminal statute does not address any current problem or need because the vast majority of teenagers under fifteen have voluntarily involved their parents in the abortion decision and are accompanied by a parent to the Akron clinics. (J.A.119, 140, 152-153, 179, 228, 263,314-315, 476, 480-484.) A four month survey at plaintiff Akron Center for Reproductive Health indicated that 26 of 29 women 14 years of age came to the clinic with a parent, while each of the seven younger women who came in was thus accompanied. (J.A. 152-153) The primary reason why Akron women under 15 years of age have not, on occasion, involved their parents in the abortion decision-making process was described by Yvonne Bolitho, Director of Counseling at plaintiff Akron Center for Reproductive Health, "their concern was that additional physical abuse would occur if the parents were knowledgeable of the abortion." (Transcript Volume III at 73-74)

The evidence further demonstrated that some women under fifteen are mature and can make the requisite medical decision when necessary. This was the view of Dr. Felix Heald, Professor of Pediatrics and Director of the Division of Adolescent Medicine at the University of Maryland School of Medicine (J.A. 201), Dr. Adele Hofmann, Professor of Pediatrics and Director of the Adolescent Medical Unit of the New York University Medical Center (J.A. 284,303), and of defendants' expert Dr. Jasper Williams. ("[S]ome kids at 14 are more mature than their parents and you have more trouble talking to the parents than the patient. "(J.A. 747))

2. Section 1870.06(B) setting forth 44 lines of information the attending physician must recite to every woman, would substantially burden women

seeking abortions in Akron and their physicians.

Section 1870.06(B) of the Akron ordinance inflexibly mandates that the physician, on threat of criminal penalty, recite in every case the information outlined in 44 lines of printed material (Appendix 121a-122a) to pregnant patients seeking abortions. Included in this material is a requirement that the physician provide a detailed description of the "anatomical and physiological characteristics of the particular unborn child," and that he state "that the unborn child is a human life from the moment of conception." The District Court found that this Section of the ordinance requires the recital of information that may be untrue and information that is unavailable to medical science. 479 F. Supp. at 1203. The inflexibility of Section 1870.06(B) is its clearest and most injurious defect.It can cause psychological harm to patients and destroy the informed consent dialogue.[8](J.A. 353, 359, 367-368) The evidence demonstrated other flaws as well. As noted by the District Court, these include an insistence that physicians provide information unavailable to medical science[9] and that they make potentially misleading, threatening or unscientific declarations.[10] Other flaws include the requirements that physicians provide information to their patients before accurate data can be obtained;[11] and, that they provide data without any clearly delineated limitations.[12] Any deviation from the requirements of this section may be punished as a first degree misdemeanor.

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[8] Plaintiffs' witness, Dr. Jay Katz, of the Yale Medical and Law Schools testified that in 11 to 17 percent of all cases of medical treatment patients do not wish to hear a detailed recitation of risks or procedures. (J.A. 352-353) In the interest of preserving the patient's health, well-being and ability to make a rational decision it is sometimes necessary for the physician to exercise therapeutic privilege and dispense with such recitations. (Id.) This is as important in the abortion context as elsewhere. (J.A. 362-363) The State of Ohio specifically recognizes therapeutic privilege in Ohio Sanitary Code Section 3701-47-06 which requires that in all abortions after the fourteenth week from the last menstrual period "counseling ... shall not be forced upon the woman."

[9] See, e.g., the testimony of plaintiffs' witness, Nobel laureate, Dr. Frederick Robbins, that despite the demand of subsection 1870.06(B)(3), science has no answer to the question whether a fetus at six weeks gestation feels pain. (J.A. 406)

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[10] See, e.g., the testimony of plaintiffs' witness Dr. Christopher Tietze, one of the foremost population demographics and birth control experts in the United States, that despite the assertion of subsection 1870.06(B)(5) there is no evidence that early abortion increases the risk of sterility or later miscarriage. (J.A. 381)

[11] For the physician performing menstrual extractions it is impossible, because of the early stage of the pregnancy, to flatly declare to the patient whether or not she is pregnant as required by subsection 1870.06(B)(1). See Planned Parenthood of Kansas City v. Ashcroft, 655 F.2d 848, 868-69 (8th Cir., 1981).

[12] As the District Court noted in this case, subsection 1870.06(B)(3) requires a limitless recitation of fetal characteristics, by using the phrase "including, but not limited to..." 479 F. Supp. at 1203. The same problem is posed by subsections 1870.06(B)(6) and (7) which require the provision of limitless lists of counseling agencies. (Appendix 122a)

3. Section 1870.06(C) requiring that the "attending physician" personally inform each patient is psychologically and economically burdensome in Akron, Ohio, where there are few doctors who perform abortions.

Using a "rational basis" test, the District Court upheld Section 1870.06(C), requiring that the "attending physician"[13] personally, in every case inform his patient "of the particular risks associated with her own pregnancy and the abortion technique to be employed." (Appendix 122A) In examining the same evidence, but using a stricter standard of review, the Court of Appeals concluded that this requirement directly interferes with the exercise of a woman's right to seek an abortion and is unconstitutional.

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[13] Nowhere in Chapter 1870 is the word "attending" defined. However, both defendants and intervenors have at all times interpreted the word to mean the same doctor who is to perform the abortion. See, e.g., material cited in note 5, supra. This distinguishes Section 1870.06(C) from the regulation upheld in Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir., 1981), where counseling had to be performed by a physician not "the" physician.

It was uncontested that the majority of women seeking abortions in Akron have been professionally counseled and have made up their minds with respect to the necessity for an abortion before they arrive at one of the Akron clinics.

(J.A. 140, 170, 225, 262-263, 314, 477, 512, 558, 735) Further the District Court specifically found that, except in cases of therapeutic concern, each patient is counseled at the Akron clinics, informed orally and in writing of the risks attendant to the abortion procedure, instructed in techniques of birth control, and provided aftercare instructions before an abortion is ever performed. 479 F. Supp. at 1181-1182.

The District Court also found that the attending physician at each procedure performed in one of the Akron clinics reviews each patient's medical chart with her (the charts contain information concerning counseling, medical history and desire for an abortion), makes inquiry concerning any questions the patient may have and performs a thorough pelvic examination. 479 F. Supp. at 1182. If the doctor at any time during this process detects a note of hesitancy or ambivalence with respect to the abortion procedure he will "suggest that [the patient] return at another time after she [has] had some additional time to consider alternatives to abortion." 479 F. Supp. at 1182 (J.A.148-149, 175, 221, 515, 593, 609).

Section 1870.06(C) has the effect of overriding the physician's choice concerning counseling. It forces the attending physician to carry out all phases of pre-abortion counseling whether or not, in his professional judgment, he is the best one to perform the task.

Section 1870.06(c) also has the effect of substantially increasing the cost of abortions in Akron. (J.A. 222-224, 495, 516) When coupled with the twenty-four hour delay provision of the ordinance, Section 1870.06(C) may require that the same physician see each woman on at least two occasions twenty-four hours apart[14] thereby multiplying operating expenses dramatically. (*Id*.) The burden imposed by Section 1870.06(C) is exacerbated by the fact that there are very few physicians who perform abortions in Akron, Ohio. The few physicians who do perform abortions have only been willing to devote a limited amount of their professional time to work in the clinics. (J.A. 116, 222-224, 458, 521) A substantial increase in the time required of each physician is likely to lead to the shutdown of the clinics or a substantial increase in their operating cost. (*Id*.)

[14] The question of when the physician must speak the words mandated by Section 1870.06(C) is not free from doubt. This "vagueness" is an additional defect of the section and is discussed at note 5 *supra*.

4. The evidence overwhelmingly supports the circuit court's holding that Section 1870.07 mandating a twenty-four delay, burdens women seeking abortions in Akron, Ohio.

Section 1870.07 of the Akron ordinance imposes at least a twenty-four hour delay between the time a woman signs a mandatory consent form and the performance of the abortion procedure. Although the District Court found this burdened women needing abortions, it upheld the requirement under a rational basis test.[15] 479 F. Supp. at 1204-1205. The Sixth Circuit, consistent with the three other Circuits that have addressed this issue (see Point II, infra), reversed, holding that the requirement was neither supported by a compelling state interest, nor narrowly tailored. 651 F.2d at 1208.

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[15] The District Court found that delay will increase costs and will force each woman to make at least two trips to the clinic, with attendant travel, child care, and work loss expenses. 479 F. Supp at 1204-1205 (Appendix 98a).

The evidence demonstrated that twenty-four hours is the minimum delay caused by Section 1870.07. In most cases the delay will be for longer, because Akron clinics perform abortions only three days a week, and specialized procedures involving anesthesia only once a week. (J.A. 139, 156, 222-224, 226-228, 495, 521) Delays of from two to seven days will be the norm. (Id.) The evidence indicated that these delays will expose women seeking abortions in Akron to serious increases in morbidity and mortality risks (J.A. 107, 116, 305-306), and can also cause serious psychological harm. (J.A. 115-117, 368-369) Imposing an unwaivable delay on victims of rape was described by the witnesses as perhaps the most serious psychological problem, however delay will cause injury in other cases as well. (Id.)

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

I. DEFENDANTS HAVE PREVIOUSLY CONCEDED THE UNCONSTITUTIONALITY OF ORDINANCE SECTIONS REGULATING MINORS AND IMPOSING VARIOUS RESTRICTIONS ON THE INFORMED CONSENT DIALOGUE

Despite the District Court ruling that Section 1870.05(B) (veto and notification) was unconstitutional, the defendants neither briefed nor argued the constitutionality of that section in the Sixth Circuit Court of Appeals. The Court of Appeals found that defendants had not appealed the ruling against them on this issue. 651 F.2d at 1205. Under these circumstances defendants have waived the right to argue the constitutionality of Section 1870.05(B) before this Court. See California v. Taylor, 353 U.S. 553, 556-557 n. 2 (1957).

Further, defendants in their brief to the Court of Appeals on February 28, 1980, specifically conceded that subsections (3), (4), and (5) of Section 1870.06(B) (mandating the recital of a 44 line script) were unconstitutional. Defendants requested that the Court of Appeals "sever the unconstitutional subsections [(3), (4) and (5)] of Section 1870.06(B)." Defendants' Brief to the Court of Appeals dated February 28, 1980 at 35. Defendants now attempt to retract this admission by arguing in their petition that all of Section 1870.06(B) is constitutional. Pursuant to California v. Taylor, this argument is improper and defendants are barred from urging the opposite of what they conceded in the court below.

II. THE DEFENDANTS AND INTERVENORS PRESENT NO SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF REVIEW

Rule 17 of this Court's Rules delineates "considerations governing review on certiorari." Defendants and intervenors fail to make any reference to Rule 17, and in fact present no reason for the granting of review cognizable under Rule 17.

A. There Is No Conflict Between the Decision in the Present Case and Any Decision of Another Court of Appeals

Defendants and intervenors do not claim that certiorari should be granted because of a conflict between the ruling in the present case and the decision of another Circuit Court of Appeals. See Supreme Court Rule 17(a).In fact, the decision in this case is consistent with those in all the Circuits that have ruled on the issues.

In the past two years three Circuits besides the Sixth Circuit have reviewed statutes containing abortion restrictions almost identical to four of the five restrictions that defendants and intervenors are requesting this Court review.[16] Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (Charles); Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981) (Planned Parenthood League); Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) (Ashcroft); see also Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978); 599 F.2d 193 (7th Cir., 1979); Womens Services, P.C. v. Thone, 636 F.2d 606 (8th Cir. 1980), reversed and remanded ___ U.S. ___, 69

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[16] Section 1870.16 ("humane" disposal) was held unconstitutional by both the District and Circuit Courts because its wording was "impermissibly vague" for a criminal statute. 479 F. Supp. at 1206; 651 F.2d at 1211. No other circuit has addressed this question although a textually similar Pennsylvania "enabling statute" was not held to be burdensome in Planned Parenthood Association v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975), aff'd sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976). The distinctions between the present case and Fitzpatrick will be discussed at Point II C. infra.

L. Ed.2d 414 (1981). The Circuit Courts have agreed not only about the unconstitutionality of similar sections; they have also agreed on the constitutional standard of review to be used pursuant to the requirements of Roe v. Wade, 410 U.S. 113 (1973).

The standard of review used by the Circuits requires the court first to determine whether a state regulation directly interferes with the ability of the woman, with her doctor, to make or effectuate the abortion decision. If such interference is found, the state has the burden of justifying the regulation by showing a compelling interest. If a compelling state interest is established, the regulation must be further examined to determine whether it is sufficiently narrowly drawn so that it does not impose an "undue burden." See

Akron Center for Reproductive Health v. City of Akron, 651 F.2d at 1202-1204 (Akron Center); Charles, 627 F.2d at 776-778; Planned Parenthood League, 641 F.2d at 1014-1016; Ashcroft, 655 F.2d at 855.

Each of the four Circuits has concluded that a state-mandated waiting period is burdensome and supported by no compelling interest. See Akron Center, 651 F.2d at 1208; Charles, 627 F.2d at 785-786; Planned Parenthood League, 641 F.2d at 1014-1016; Ashcroft, 655 F.2d at 866. Each of the four Circuits has also invalidated as burdensome, state-mandated intrusions into the informed consent dialogue between the physician and pregnant patient. See Akron Center, 651 F.2d at 1206-1207; Charles, 627 F.2d at 779-784; Planned Parenthood League, 641 F.2d at 1016-1022; Ashcroft, 655 F.2d at

866-869. (The cases contain minor variations based primarily upon differences in the statutes under consideration or upon the vagaries of the factual showing made in each case.) Finally, three of the four Circuits have agreed with respect to the unconstitutionality of regulations which provide no alternative to mandatory parental notification or consent.[17] See Akron Center, 651 F.2d at 1205; Planned Parenthood League, 641 F.2d at 1009-1011; Ashcroft, 655 F.2d at 857-859. (In Akron Center and Ashcroft this led to invalidation. In Planned Parenthood League the statute provided an alternative and was upheld.)

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[17] The Seventh Circuit had previously invalidated a "veto and notification" requirement for minors in Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978).

B. The Decision of the Court of Appeals Is Consistent with the Decisions of This Court

1. The standard of review used by the Sixth Circuit is consistent with the standard of review of this Court

Defendants and intervenors distort the standard of review used by this Court in assessing abortion restrictions. They propose that the proper standard is that every abortion regulation should stand if the plaintiffs do not come forward and prove that the regulation "unduly burdens" a woman's right to choose abortion. This proposal would not only overturn the standard established in Roe v. Wade, but would also make judicial scrutiny in cases involving abortion restrictions radically different from scrutiny in cases involving every other fundamental constitutional right.

This Court has consistently adhered to the position it first established in Roe v. Wade, that state interference which burdens the abortion decision is only permissible when the state has demonstrated a compelling interest justifying regulation. Roe v. Wade, 410 U.S. at 155, 162-163. This standard was affirmed in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976), as well as the cases that have followed it. As this Court stated in Carey v. Population Services International, 431 U.S. 678 at 688 (1977), abortion regulations "'may be justified only by a compelling state interest ... and must be narrowly drawn to express only the legitimate state interests at stake.'"

Defendants place central reliance on Thone v. Womens Services P.C., ___ U.S.

___, 69 L.Ed.2d 414 (1981) an order vacating and remanding an Eighth Circuit decision. Defendants cite Thone no fewer than seven times in support of five of their seven arguments. Such reliance is misplaced because an order vacating and remanding a lower court decision is devoid of precedential authority. See Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964).

Defendants also rely on Harris v. McRae, 448 U.S. 297 (1980), and Maher v. Roe, 432 U.S. 464 (1977). Again, defendants' reliance is misplaced. This Court specifically restated in Maher its adherence to the standards established in Roe v. Wade. See Maher v. Roe, 432 U.S. at 475. Maher distinguishes "between direct state interference with a protected activity and state encouragement of an alternative activity." Id. It applies a relaxed constitutional test only in the latter situation. Id. at 476-477. Harris v. McRae, reaches precisely the same result. It declares that "if a law 'impinges upon a fundamental right ... [it] is presumptively unconstitutional'". Harris v. McRae, 448 U.S. at 312.

Finally, defendants seek to rely on decisions by this Court considering restrictions on the availability of abortions to minors. See Bellotti v. Baird, 428 U.S. 132 (1976) (Bellotti (I)); Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti (II)); and H.L. v. Matheson, 450 U.S. ___, 101 S. Ct. 1164 (1981). The requirements of these cases with respect to the law governing minors will be discussed at Point II B 2 infra. At this point, it should simply be noted that it is erroneous to use these cases as support for abortion regulations governing adult women. In Planned Parenthood of Missouri v. Danforth, 428 U.S. at 74, this Court stated "the State has somewhat broader authority to regulate the activities of children than of adults." See Bellotti(II), 443 U.S. at 633-634; Carey v. Population Services International, 431 U.S. 678 (1977).[18]

2. The Court of Appeals' ruling is consistent with this Court's decisions concerning regulations restricting the availability of abortions to minors

The Court of Appeals in the present case invalidated Akron Ordinance Section 1870.05(B), which requires parental or judicial consent and cedes to parents or judicial officers an absolute veto whenever women under fifteen years of age seek abortions. Neither in Chapter 1870 nor in Ohio Revised Code Chapter 2151 is there any provision allowing "best interests" or "mature" minors to get an abortion. Both the District Court, 479 F. Supp. at 1201, and the Court of Appeals, 651 F.2d at 1205, concurred in the finding that an absolute veto requirement is imposed pursuant to Section 1870.05(B).

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[18] In Carey v. Population Services International, this Court held that restrictions on access to contraceptives by adults must be supported by a compelling state interest. 431 U.S. at 690. This Court further held, citing Planned Parenthood of Missouri v. Danforth, that, as to restrictions on minors, the test is "less rigorous than the 'compelling state interest' test applied...[to] adults," and significant state interests were sufficient. 431 U.S. at 693 fn. 15.

In Planned Parenthood of Missouri v. Danforth, this Court held "that the State may not impose a blanket provision ... requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first twelve weeks of pregnancy." 428 U.S. at 74. This proposition was reiterated in Bellotti v. Baird (II), when eight Justices of this Court agreed that an absolute veto is impermissible. See 443 U.S. at 643 (Opinion of Powell, J.); 443 U.S. at 653-654 (Opinion of Stevens, J.). Akron Ordinance Section 1870.05(B) authorizes a blanket veto and was properly held unconstitutional. (Chapter 1870 was drafted long before this Court's decision in Bellotti v. Baird (II), and is not informed by the principles announced in that opinion.)

Further, Section 1870.05(B) is unconstitutional because there is no way any minor can bypass parental notification. Once a complaint has been filed in a juvenile court in Ohio, notice must be provided to the parents of the child involved in the proceeding. See Ohio Revised Code Chapter 2151. Intervenors specifically admitted this fact during the pendency of this action and the District Court took special notice of their admission. 479 F. Supp. at 1201. In Bellotti v. Baird (II), Justice Powell, writing for four Justices of this Court, concluded that a blanket parental notice requirement is unconstitutional. See 443 U.S. at 642-648. In H. L. v. Matheson, at least five Justices of this Court concurred in the proposition that "a State may not validly require notice to parents in all cases." See 101 S.Ct. at 1176-77 (Concurring Opinion of Powell, J.); 101 S.Ct. 1184-1194 (Dissenting Opinion of Marshall, J.). Upon the strength of these precedents the Court of Appeals for the Eighth Circuit invalidated a blanket notication requirement in Ashcroft. See 655 F.2d at 859.

3. The Court of Appeals' ruling is consistent with this Court's rulings concerning regulations interfering with the abortion decision-making process

This Court has consistently stressed the importance of respect for the professional judgment of the physician in the abortion context. In Planned Parenthood of Missouri v. Danforth, this Court permitted the states to require that the woman give her "informed consent" before an abortion is performed. See 428 U.S. at 65-67. However, Danforth specifically limited "informed consent' by construing it to mean

> the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

Id. at 67, n. 8. In Colautti v. Franklin, 439 U.S. 379, 387 (1979) this Court found that "up to the points where important state interests provide compelling justifications for intervention 'the abortion decision in all its aspects is inherently and primarily a medical decision.'"[19]

Chapter 1870 impermissibly straitjackets the physicians in the practice of their profession. First, the Chapter requires a written consent form of the sort authorized in Danforth.

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[19] Consistent with these principles is this Court's affirmance of the decision of the Eighth Circuit in Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978) aff'd 440 U.S. 941 (1979). There the Circuit Court invalidated a regulation compelling the physician to tell each woman that any live-born infant resulting from an attempted abortion would become the ward of the state. The Eighth Circuit condemned the regulation because it interjected "irrelevant and extraneous" material into the informed consent dialogue and jeopardized the physician-patient relationship. Freiman v. Ashcroft, 584 F.2d at 251-252.

(Section 1870.06(A)--not challenged here.) The Chapter goes on from there to establish an inflexible rule that the attending physician personally in all cases, recite a 44 line statement including inaccurate, biased, and irrelevant material including the statement that the "unborn child is a human life from the moment of conception." (Section 1870.06(B)) The ordinance next requires that in all cases, the "attending physician" separately recite (at some inadequately defined time) details about risk and procedure. (Section 1870.06(C)) Finally, the ordinance inflexibly mandates that all abortions be delayed at least twenty-four hours. (Section 1870.07) Any deviation from this procedure exposes the physician to criminal liability, including a jail sentence and possible loss of license.

Not only are these restrictions a straitjacketing of the physician, they are also fundamentally incompatible with the doctrine of informed consent which seeks to preserve the physical and psychological integrity of the patient by allowing her (rather than the state) a significant degree of control over the treatment process.[20]

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[20] For a discussion of the doctrine of informed consent see J. Katz, EXPERIMENTATION WITH HUMAN BEINGS, 540-588 (1972). Pursuant to the doctrine of informed consent there are two situations in which information should not be pressed upon a patient. The first of these involves the patient's specific request not to be informed. See Cobbs v. Grant, 8 Cal.3d 229, 502 P.2d 1 (1972); Ohio Sanitary Code Section 3701-47-06 (referring specifically to second trimester abortions). The second arises when the physician specifically determines that the recital of information will be harmful and exercises a therapeutic privilege not to provide it. See Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

C. A Number of the Questions Presented by Defendants Are of No General Importance

Defendants complain about the failure of the District Court and the Court of Appeals to redraft various sections of Chapter 1870 (Sections 1870.06(B) and 1870.16) by severing allegedly constitutional fragments from unconstitutional material. Determinations about severability made by district courts will not be upset without a showing of good reason therefore. See Sloan v. Lemon, 413 U.S. 825, 834 (1973).

In the present case both the District Court and the Court of Appeals passed upon the question of severability. Each determined that judicial redrafting of the arguably constitutional bits and pieces of invalid sections of Chapter 1870 was inappropriate. In similar circumstances the Sixth Circuit has previously held it inappropriate for a court to "untangle the constitutional provisions from the unconstitutional ... by attempting to rewrite the minor provisions of the ordinance." Mahoning Women's Center v. Hunter, 610 F.2d 456, 460-461 (6th Cir. 1979), vacated and remanded on other grounds, 447 U.S. 918 (1980). Defendants have not satisfied the requirements of Sloan v. Lemon, nor have they demonstrated that the sections could have or should have been untangled and rewritten. Finally, the question whether minor fragments of the ordinance should have been judicially redrafted can hardly be said to be of any general significance, and is, therefore, not a subject fit for review. See Magnum Import Co.v. Coty, 262 U.S. 159, 163 (1923).

Defendants appear to claim that the question of the vagueness of the word "humane" as used in Section 1870.16 (a criminal ordinance) is a fit question for the plenary consideration of this Court. Both the District Court and the Court of Appeals have rejected defendants' arguments. Further, this Court's ruling in Colautti v. Franklin, applies because the word "humane" is, in this context, "little more than a trap for those who act in good faith." 439 U.S. at 395. Defendants' only argument is that the present decision is inconsistent with that in Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa.

1975) aff'd sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976). This assertion is erroneous. Fitzpatrick reviewed nothing more than an "enabling statute" pursuant to which regulations had not as yet been adopted. 401 F. Supp. at 572-573. As indicated in Winters v. New York, 333 U.S. 507 (1947), enabling statutes are to be judged by a different standard than statutes directly regulating conduct. Further, as with the question of severability, it can hardly be said that the question defendants present is so important as to warrant this Court's review. See Magnum Co. Import v. Coty, 262 U.S. at 163.

III. REVERSAL OF THE DECISION OF THE COURT OF APPEALS WOULD LEAD TO CONFUSION IN THE DETERMINATION OF CASES INVOLVING ABORTION REGULATION AND WOULD PROMOTE AD HOC ADJUDICATION

There is remarkable agreement within the Circuits concerning regulations restricting access to abortions. The clarity of the principles upon which decisions are now being rendered has produced this high degree of decisional uniformity. The announcement of a new and different set of standards by this Court could serve to introduce uncertainty where none now exists.

The greatest source of uncertainty would be the sort of "standardless" due process test advocated by the defendants and intervenors. Adoption of such a test would mean nothing more nor less than unstructured district court review premised upon an _ad hoc_ search for "reasonableness" in each case. See _Charles v. Carey_, 627 F.2d at 778. The variety of results and conflicts that would arise would be extensive. In a different area this Court has declared that such _ad hoc_ adjudication "would lead to unpredictable results and uncertain expectations and it could render our duty to supervise the lower courts unmanageable." Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974).

IV. THE LAPSE OF TIME HAS RENDERED INTERVENORS' CLAIMS MOOT

At trial intervenor Seguin testified that he had a fourteen year old daughter and another daughter of unspecified age. (Transcript Volume VII at 49) Intervenor Black testified that she had a fourteen year old daughter. (J.A. 499) Each of the described daughters is now at least seventeen years of age. Neither intervenor provided any information on the record about any other daughters. The focus of intervenors' Petition is Section 1870.05(B) of the Akron Ordinance which applies only to "minor pregnant [women] under the age of fifteen (15) years." It would appear, based on the record in this case, that the lapse of time has rendered intervenors' claims moot.

In Atherton Mills v. Johnston, 259 U.S. 13 (1922), both a parent and a child filed suit to challenge the constitutionality of the Child Labor Tax Act which placed limits on the hours worked by a child under sixteen years of age. During the pendency of the litigation the child passed his sixteenth birthday. This Court, per Chief Justice Taft, held that the "lapse of time" had rendered the case moot. Atherton Mills v. Johnston, 259 U.S. at 15. The Court so held with respect to the independent action of the parent as well as the action of the minor.

Where, as here, no class has been certified and a litigant has no continuing interest in the action, his claims must be dismissed as moot. See Atherton Mills v. Johnston; Indianapolis

School Commissioners v. Jacobs, 420 U.S. 128 (1975); DeFunis v. Odegaard, 416 U.S. 312 (1974). The major exception to this rule involves cases that are "capable of repetition yet evading review." In Weinstein v. Bradford, 423 U.S. 147 (1975), this Court defined such cases as those in which it is "virtually impossible" to litigate in the time before the occurrence of the mooting event and in which the same party faces the identical problem in the future. Id. at 149. Here, intervenors have satisfied neither part of the Weinstein test. Any number of parents might be found who could establish on the record a continuing interest stretching over many years. Intervenors have not established such an interest. Under these circumstances intervenors claims should be dismissed as moot.

As a final matter it should be noted that intervenors were allowed to proceed in this case only for the purpose of advancing claims touching on Section 1870.05 of the Akron Ordinance and perhaps those subsections of 1870.06 brought into play because of Section 1870.05.[21] Pursuant to this Court's ruling in Boston Tow Boat v. United States, 321 U.S. 632 (1944), intervenors may only appeal those questions directly arising out of an "appealable interest." Here intervenors' interest has been rendered moot and no appeal is appropriate.

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[21] See note 4 *supra*.

CONCLUSION

For the foregoing reasons the petitions for a writ of certiorari should be denied.

Dated: Cleveland, Ohio
December, 1981

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981
NO. 81-854

FRANCOIS SEGUIN, M.D.

and

PATRICIA BLACK,
Petitioners,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., *ET AL.*,

and

CITY OF AKRON, OHIO, *ET AL.*,
Respondents.

PETITIONERS' REPLY BRIEF

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INTRODUCTION

This reply to Respondents' Consolidated Brief in Opposition to Certiorari in Nos. 81-746 and 81-854 is submitted by Petitioners in No. 81-854 to respond to new matter raised by the respondent clinics and to clarify the confusion engendered by the consolidated response.

ARGUMENT

I. THE CLAIMS OF PETITIONERS SEGUIN AND BLACK ARE NOT MOOT.

Part IV of respondents' consolidated opposition to the petition in No. 81-854 raises a mootness issue not briefed by petitioners. The reason is very simple: the argument that this case has been mooted by the passage of time is simply wrong. At trial, petitioner Seguin testified as follows:

Q: Do you have any children?

A: I have four children.

Q: And what are their ages?

A: 15, through 8

Q: Do you have any children of childbearing age?

A: Yes, I have one daughter of 14-1/2.

Q: Do you have any other children who will be of childbearing age *in the future*?

A: Yes, I have another daughter.

(Tr. Volume VII, at 49) (emphasis added)

Petitioner Black also testified that her daughter who was fourteen at the time of trial was only one of eight children. Notably, her fourteen-year-old daughter was the only one of her children who *at the time of trial* had *reached* childbearing age. (J.A. 499) It goes without saying that her other children were younger.

Thus, there is nothing in the record below to indicate that this case is moot because the petitioners do not presently have children of childbearing age.

II. PETITIONERS SEGUIN AND BLACK HAVE NEVER CONCEDED THAT ANY PART OF THE ORDINANCE AT ISSUE IN THIS CASE IS UNCONSTITUTIONAL

The consolidated brief filed by the respondent clinics causes considerable confusion regarding the position of the petitioners in No. 81-854, Francois Seguin and Patricia Black. Although their intervention in the District Court was limited to defense of the ordinance as it applies to minors, the respondent clinics have consistently sought to restrict their ability to do so.

Section I of respondents' "reasons why the petition should not be granted" seems to imply that the unconstitutionality of Section 1870.06 was admitted by all parties below, but it really speaks only to the alleged position of the petitioner in No. 81-746, the City of Akron. It says nothing regarding the position of petitioners Seguin and Black, who argued below and in this Court that the ordinance is constitutional both on its face and as applied to minors in No. 81-854.

III. THE DECISIONS OF THIS COURT REGARDING PARENTAL NOTICE/ JUDICIAL CONSENT ARE *NOT* CONSISTENT WITH THE DECISION BELOW OR WITH THE DECISIONS OF OTHER COURTS OF APPEAL

The petition in No. 81-854 presents "an important question...which has not been, but should be, settled by this Court..." Rule 17(c), Rules of the Supreme Court of the United States. This is so because the decisions of this court appear to fix the following guidelines regarding abortions, both in general and as applied to minors.

1. Abortion is to be accorded the same treatment as any other medical procedure,

except in fairly well-defined public policy areas. *See, Doe v. Bolton, 410 U.S. 179 (1973); Harris v. McRae, 448 U.S. 297 (1981).*

2. A parent may not exercise absolute "veto" over the decision of a minor to have an abortion. *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).*

3. The state may, however, provide a judicial alternative to parental consent when the maturity of the minor is in doubt, since consent by an immature minor would not be knowing and informed. *Bellotti v. Baird, 428 U.S. 132 (1976); Bellotti v. Baird (II), 443 U.S. 622 (1979).*

    a. If the minor is found by the court to be mature, she must be permitted to make the decision, *Bellotti v. Baird (II), supra.*

    b. If the minor is found by the court to be immature, it must then determine whether the abortion is in her "best interests". *Bellotti v. Baird (II), supra.*

4. The state may provide for parental notice where immature unemancipated minors are involved. *H.L.* v. *Matheson, 450 U.S. -, 101 S.Ct. 1164(1981)*

Notably, this case presents several issues which are of crucial importance in defining the parameters the Court has prescribed respecting immature minors:

1. *Is it unconstitutional to treat abortion like any other medical procedure performed on minors?*

The Ohio laws which are alleged to be the basis for the finding of unconstitutionality below are Chapter 2151 of the Ohio Revised Code and the Ohio Rules of Juvenile Procedure. They prescribe the procedure for any case involving the neglect or refusal of a parent to permit necessary medical care. The respondent clinics want judicial exemption from a general rule they refuse to follow. In petitioners' view, this turns the rationale of *Doe* v. *Bolton*, *supra*, on its head.

2. *Is it unconstitutional to provide notice to parents of a pending judicial proceeding regarding a proposed abortion which will affect their statutory and constitutional rights to custody of their unemancipated, immature minor children?*

3. *Does Section 1870.05(B) of the Akron Ordinance permit a "veto" simply because a juvenile court judge, acting pursuant to Ohio Rev. Code Chapter 2151, could find, on the record, that a minor is immature and*

that the abortion is not in her best interests?

These important federal questions have never been addressed by this Court, but the decisions below assume that this Court has spoken. Respondents have taken to "counting heads" in this Court in a vain attempt to show that a decision has been made "in effect", but a decision on the merits of the questions presented is what is needed. The Court should grant the petition and settle the issue so that state courts, physicians, minors and parents will know their respective rights and obligations. *Compare, In the Matter of a Minor Child, D.O.B. 11-11-69, and a Minor Child, D.O.B. 9-28-70, No. N.81-39 Probate Court, Juvenile Division, Kalamazoo County, Michigan, opinion filed October 23, 1981 (Halstead, J.), on* remand from *In the Matter of a Minor Child,* etc., *No. B-813-00-746-AV, filed October 21, 1981,* with *Nelson Pelletier, Attorney and/or guardian ad Litem of Minor Child born 11-11-69 v. Father of Minor Child Born 11-11-69, Mother of Minor Child Born 11-11-69, Probate Court County of Kalamazoo, Donald Halstead, Probate Judge for Kalamazoo County and Kalamazoo County Circuit Judge, John Fitzgerald, K81-384 CA4 (W.D. Mich., filed October 20, 1981)(same case).*

IV. REVERSAL OF THE DECISION BELOW WOULD NOT RESULT IN CONFUSION IN CASES INVOLVING ABORTION REGULATIONS

Respondents have raised the novel argument that close scrutiny and reversal of the decision below is unwarranted because of the "remarkable agreement" among the Courts of Appeal regarding abortion regulations. This is neither novel, nor surprising in the area of abortion. *But see, Harris v. McRae, supra; Maher v. Roe, 432 U.S. 464 (1977).* The result in almost every lower court decision on abortion has been wholesale invalidation of restrictions designed to protect maternal health and foster the decision-making process because a blanket "compelling state interest" test is applied in a matter which is roughly equivalent to an absolute veto.

Justice Stevens' recent opinion in *Vincent v. Widmar, No. 80-689 (filed December 8, 1981)* recognized the ambiguity of the phrase "compelling state interest", *Slip opinion at 3 (Stevens, J. concurring).* As applied to health regulations clearly designed to protect maternal health and the decision-making process from an abortion clinic's assembly-line process without seriously considering whether the alleged "burdens" claimed by clinics (which do not profit unless the decision is in favor of abortion) are real or imaginary. The standard of review applied by the courts below merely guarantees a preconceived result. Unfortunately, the lower courts have taken Justice Blackmun's opinion for the Court in *Roe v. Wade, 410 U.S. 113 (1973)* and applied it in a manner which he himself has criticized as

> "...what seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling [state] interest' and 'least drastic [or restrictive] means.' I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly compelling' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also a signal of the

> result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 188-189 (1979) (Blackmun, J. concurring* *__quoted in__. Vincent v. Widmar,* *__Slip opinion__ of Stevens, J. at 3 n.3 (December 8, 1981)*

The Court should, therefore, grant the petition and determine whether - and to what extent - the facts are relevant in cases such as this.

Respectfully submitted,

signed: ROBERT A. DESTRO

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PROOF OF SERVICE

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